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81 -2341
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HARVEY KUDLER and MARCIA KUDLER,

Petitioners,

vs.

MALLORY IRA SMITH,

Respondent,

and regarding,

BRIAN ALEXANDER SMITH and
VANESSA LAUREN SMITH,

Children.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

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QUESTION PRESENTED

Whether the judgment of the Court of Appeals, State of Colorado, in substance and effect, by interposing a state ground of decision having no fair support, violated a federal right of petitioners raised in the court below, pursuant to the provisions in Art. IV §1 of the United States Constitution, seeking enforcement in the State of Colorado, of the Judgment of the Supreme Court, State of New York, County of Queens, dated May 1, 1978, granting custody of the children, BRIAN and VANESSA, to respondent, MALLORY IRA SMITH, the father, and visitation rights to petitioners, HARVEY KUDLER and MARCIA KUDLER, maternal grandparents of the children.

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SUPREME COURT OF THE UNITED STATES
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MARCIA KUDLER,

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vs.

MALLORY IRA SMITH,

Respondent,

and regarding,

BRIAN ALEXANDER SMITH and
VANESSA LAUREN SMITH,

Children.

PETITION FOR A WRIT OF
CERTIORARI TO THE COURT OF
APPEALS OF THE
STATE OF COLORADO

Petitioners, HARVEY KUDLER and MARCIA KUDLER, respectfully pray that a Writ of Certiorari be issued to review a judgment

of the Court of Appeals of the State of Colorado in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported in Colo. App. 643 P.2d pp. 783-786. It is also reproduced as Appendix "B", infra, pp. 3a-12a.

The District Court Opinion has not yet been reported. It is reproduced as Appendix "C", infra, pp. 13a-28a.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 29, 1981. Rehearing Denied December 31, 1981. Certiorari Denied by the Supreme Court of Colorado, March 29, 1982.

The Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

It runs to the Judgment of the Court of Appeals, because that is the highest court of the State of Colorado in which a decision could be had, after the order of the Supreme Court of Colorado, supra.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article IV §1 of the United States Constitution

Title 28 United States Code §1257(3)

Title 28 United States Code §1738A

Colorado Revised Statutes

Sections 14-13-114,
14-13-115 U.C.C.J.A.

Colorado Statute 1-19-116(4) (1980)

The pertinent text of the foregoing provisions is set forth in the Appendix, infra.

STATEMENT OF THE CASE

JUDY SMITH (daughter of petitioners) married MALLORY IRA SMITH on December 22, 1968. Two children, a boy and girl were born to them.

BRIAN ALEXANDER SMITH was born on September 21, 1969, and VANESSA LAUREN SMITH was born on November 1, 1972.

In the early part of 1974, MALLORY and JUDY separated and she took the children. Late, in 1974, the infants were entrusted to the care of the maternal grandparents, with the consent of the father, when the infants' mother became ill and was unable to care for them.

JUDY committed suicide in August 25, 1976, at the age of 26.

BRIAN and VANESSA lived with their grandparents, loco parentis, for approximately four years, from 1974 to 1978.

The petitioners, MARCIA KUDLER and HARVEY KUDLER, maternal grandparents of BRIAN and VANESSA, were explicitly granted visitation rights with the children of MALLORY IRA SMITH, their father, in the same Judment of the Supreme Court of the State of New York, County of Queens, which awarded custody of the children to the father (Appendix D, infra).

In June, 1979, the father, desiring to extend the four weeks vacation specified in said Judgment, came before JUSTICE KUNZEMAN, one of the Justices of the Supreme Court of the State of New York, and requested an extension to six weeks, with a promise to return with the children to New York State within that period (Warrant of Attachment Appendix "E" and "F").

MARCIA and HARVEY KUDLER, when they located the father in Colorado, petitioned for enforcement of the New York Supreme Court

order granting them the right to visit their grandchildren, BRIAN and VANESSA SMITH.

On December 5, 1979, a hearing was held on the Writ of Habeas Corpus (Appendix "G"). At that time HONORABLE JOSEPH P. LEWIS, presiding, made it plain and clear that the Judgment of the Supreme Court was entitled to full faith and credit, stating:

> "You are under order of this Court, and you will have to comply with the order. You are under orders from the Court in New York and they also will have jurisdiction so that you cannot in any way violate the terms and conditions of the visitation, not in any manner." (Reporter's Transcript, Vol. I, pp 7-8)

The Reporter's Transcript, Volume II, covering "Hearing re: Visitation" - dated June 12, 1980, presents the record therein concerning the grandparents' application for one day visitation - for a reasonable time that day.

Their attorney, in arguing for this

brief visitation noted that the same order of the Supreme Court of the State of New York which awarded custody of the children to the father, granted visitation to the maternal grandparents, and further noted:

> "That order, to the best of anyone's knowledge, has never been overturned, so there is in existence, an order of a sister state, which, on the face of it, determines that the Kudlers have some rights of visitation of these children."
>
> . . . . .
>
> "THE COURT: Well, I reviewed the order from New York, which allowed visitation. It provided for 24 hour notice prior to the day of visitation. That's the only order thus far, as far as any visitation is concerned."

The Judgment dated August 20, 1980, nunc pro tunc, June 13, 1980 (Appendix "C") denied enforcement of the visitation rights embodied in the Judgment of the Supreme Court of the State of New York, dated May 1, 1978.

The Trial Judge rendering his opinion from the bench at the close of the hearing on June 13, 1980, stated:

> "The Court is aware of the recent statute which was a result of the amendment to Article I, Title 19, the Colorado Revised Statutes for 1976, as amended, which is now referred to as 19-1-116 of the Colorado Revised Statutes. And the Court is aware of the statute and what it proposes. Referring to 19-1-116(2), it provides for hearing when so requested by either of the parties, and that hearing was held today. That hearing was held for the purpose of determining the best interests of these children, and it devolves upon the Court, pursuant to that section of the statute, at the conclusion of the hearing, to find whether it is in the best interests of the children to grant child visitation rights to the petitioning grandparents...." (Appendix "C", infra, pp. 23a-24a) (Emphasis supplied)
>
> "...And the Court concludes therefore that to grant visitation to these grandparents under all the conditions which the Court has referred to and from all the testimony before the Court today, would not be in the best interests of these children and that --

MRS. KUDLER: Oh my god.

THE COURT: And that the petitioners seeking visitation of these grandchildren is denied.

MRS. KUDLER: May I address the Court?

THE COURT: No, you will not." (Appendix "C", infra, p. 27a)

The Court of Appeals' Judgment affirmed the lower court, stating, in pertinent part:

"On appeal, the Kudlers contend that the trial court had jurisdiction to enforce their New York visitation order but was not empowered to terminate visitation rights. However, §19-1-116(4) specifically provides for termination of visitation rights, and since the Kudlers invoked the protection of that section, they cannot now change their theory and complain that the court had no jurisdiction under it. See Wickland v. Snyder, 39 Colo.App. 403, 565 p.2d 976 (1977). (Appendix "B", infra, p. 9a) and (Colo. App. 643 P.2d 783, 785).

HOW FEDERAL QUESTION WAS RAISED IN STATE COURT

1. By the "order" to the parties by HON. JOSEPH P. LEWIS, District Judge, at the conclusion of a Hearing held on December 5, 1979. (Reporter's Transcript, Vol. I, pp 7-8, dated December 5, 1979)

2. In paragraph 8, at page 2, allegation on Motion before JOSEPH P. LEWIS, District Judge on June 12, 1980. (Reporter's Transcript, Vol. II - Re: Hearing-Visitation)

> "8. The ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK as set forth hereinabove is entitled to full faith and credit by the Courts of Colorado."

3. On June 13, 1980 (Reporter's Transcript, Vol. III, p. 2), JOSEPH P. LEWIS, Trial Judge, stated that the motion to amend has been granted and "It's been filed." The federal question appears in that pleading.

It is reproduced as Appendix "H", par. 2, p. 51a, demanding..."Full Faith and Credit Under the Applicable Provisions of the United States Constitution."

4. The federal question under Art. IV, §1, is set forth verbatim, with specificity and four leading cases construing full faith and credit, not partial faith and credit insofar as it relates to the New York State Supreme Court Judgment at bar. (Petition for Rehearing, Appendix "J", infra, pp 57a-67a)

The unexpected basis for affirmance noted in this Jurisdictional Statement, infra, "Reasons for Granting the Writ" (pp 12- shows that the federal question as to full and not partial faith and credit was seasonably reiterated on December 18, 1981, supra). cf.: Pruneyard Shopping Center v. Robins, 447 U.S. 74, 86; and Herndon v. Georgia, 295 U.S. 441, 443-444.

REASONS FOR GRANTING THE WRIT

(a)

At the outset it is pertinent to note the settled law enunciated in Ward v. Love County, 253 U.S. 17, 22, as follows:

> "It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support." (With many citations noted therein herein omitted)

Under the foregoing principle of law, it is cogent to note the observation which is cogent to the facts at bar, stated in Vandalia Railroad v. South Bend, 207 U.S. 359, 367, as follows:

> "A case may arise in which it is apparent that a Federal question is sought to be avoided or is avoided by giving an unreasonable construction to pleadings...."

It cannot be gainsaid that in the case at bar, the Judgment of the Court of Appeals erroneously rests on the basis that the label given to the pleading, i.e., "Amend" or "Amended", controls the substantive matter contained in said pleading.

Even a cursory examination of the Motion to Amend, and the Amended Petition, on its face, demonstrates that §19-1-116(4) is in addition to the Judgment of the Supreme Court of the State of New York, not in lieu of that document and the Writ of Attachment and the Writ of Habeas Corpus, dated December 5, 1979. (Motion to Amend - Appendix "H", pp. 50a-52a) (Amended Petition - Appendix "I", pp. 53a-56a)

> "(A)n amended pleading does not supersede the original pleading where it is evident that it is not designed as a substitute therefor or intended to take its place, as where it refers to its allegations, or expressly reaffirms them, or merely elaborates

> certain of them, or merely augments the original pleading by additional allegations, and in such cases the original pleading and the amendment are to be construed together." 71 C.J.S. Pleading §321a, at 718 (1951). (Emphasis added.)

To the contention that "the Kudlers cannot complain" of the "unreasonable construction" given to the aforementioned pleading, would require a rewriting of the principle of law noted in Vandalia Railroad, supra.

(b)

With respect to the Court of Appeals' assumption that the Kudlers cannot now complain, that the lower court acting under §19-1-116(4) lacked subject matter jurisdiction; the well settled law on that phase - is diametrically opposed to such assumption.

In Matson Navigation, U.S. 284 U.S. 352, 359, it is made plain and clear that:

> "As the want of jurisdiction is of the subject matter it may be considered, and appropriate judgment given, at any stage of the proceedings, either here or below."

It is axiomatic that jurisdiction of the subject matter is never waived. On December 5, 1979, Hon. Joseph P. Lewis, District Judge, acquired jurisdiction of the subject matter set forth in the Writ of Habeas Corpus, dated December 5, 1979, which brought respondent, Mallory Ira Smith to the District Court the same day, noted in the "Statement of the Case." The statute 19-1-116(4) was enacted into law on April 10, 1980.

In Cooper v. Reynolds, 77 U.S. 308, 316 (1870) the source of jurisdiction of the subject matter is defined, as follows:

> "By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred."

There is no language in 19-1-116(4) (Appendix "M", pp. 73a-74a) which suggests that the Trial Judge, acting squarely and wholly under that statute, was empowered to terminate the visitation rights granted to the petitioners by the New York Supreme Court.

On its face, Section 19-1-116(4) bears not affinity to any of the provisions of the Uniform Custody Jurisdiction Act dealing with interstate custody and visitation disputes.

In O'Donoghue v. Boies, the New York Court of Appeals, 159 N.Y. 87, 98-99, stated:

(p. 98)

> "No court or judicial officer can acquire by the mere assertion of it, or by erroneously alleging the existence of facts upon which jurisdiction depends...."

(p.99)

The Court of Appeals of New York further noted:

> "But a court authorized by statute to entertain jurisdiction in a particular case only, if it undertakes to exercise the power and jurisdiction conferred in a case to which the statute has no application, acquires no jurisdiction, and its judgment is a nullity, and will so be treated when it comes in question, either directly or collaterally."

and

> "The want of jurisdiction to render the particular judgment may always be asserted and raised directly or collaterally, either from an inspection of the record itself when offered in behalf of the party claiming under it, or upon extraneous proof, which is always admissible for the purpose."

(c)

Section 19-1-116(4) is confined to the subject matter therein. It cannot be extended to encompass the Uniform Child Custody Jurisdiction Act.

> "The rule is no doubt well understood that where the remedy is a statutory one, and a new right given and specific relief prescribed for a violation of such right, the remedy is confined to that which the statute gives...." (Jessup et al v. Carnegie et al, Court of Appeals, State of New York, 80 N.Y. 441, 456, 1880).

Davis v. Wechsler, 263 U.S. 22, 24-25, is peculiarly cogent to the basis that: "Since the Kudlers invoked the protection of that section they cannot now change their theory and complaint."

Mr. Justice Holmes, speaking for the Court, stated:

> "The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right. The principle is

> general and necessary. Ward v. Love County, 253 U.S. 17, 22. If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. Creswill v. Grand Lodge Knights of Pythias, 225 U.S. 246. This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way."

On June 20, 1979, the respondent, Mallory Ira Smith, appeared before Justice Joseph P. Kunzman, seeking an extension of vacation time limited by the Judgment of the Supreme Court of the State of New York to four weeks (Appendix "D", p. 34a).

This appears in the Reporter's Transcript, Vol. III, June 13, 1980, at pages 59-60, which presents the testimony of Harvey Kudler, petitioner, under cross examination:

"Q. Okay. Now, at that point in time for the first time in a number of years, there was only one lawsuit pending in one Court and that was here; isn't that true?

A. No, that's not true.

Q. What other lawsuit was pending?

A. Well, there was a warrant for Mr. Smith's arrest in the Supreme Court of Queens.

Q. I understand that, but with regard to the children, with regard to who would have the children, who would see the children, when they would see the children, with regard to the children, aside from this warrant for allegedly violating some order of some previous courts, aside from that, no court had before it, the issue of the these children's welfare, did they?

A. With that court, the one you are talking about had the children's welfare, because the visitation rights were in that warrant. That's why the warrant was issued. That's what the issue was before that Court.

Q. What court was that?

A. This is the Supreme Court of Queens, State of New York, Queens County, Judge Joseph P. Junzeman."

(d)

Notwithstanding the plain and clear declaration by the trial court, (Appendix C, pp 23a-24a) and page 8 "Statement of the Case", the Court of Appeals erroneously asserts:

> "Moreover the trial court had the authority to modify the New York visitation order under the Uniform Child Custody Jurisdiction Act...." (Appendix B, p. 9a)

Albeit the trial court gave no consideration at all to the UCCJA in reaching its determination solely under §19-1-116(4). (Appendix J, p. 64a)

In this context, it must not be overlooked that under the UCCJA, the critical jurisdictional requirement, is lacking.

"Home state" is defined in the UCCJA, and it is not left to speculation.

Section 14-13-103 give the statutory definition:

> "(5) 'Home state' means the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period."

The Court of Appeals takes a tight-lipped approach to the jurisdictional six month residence immediately preceding the commencement of the proceeding (December 5, 1979) by avoiding any reference to the jurisdictional "six months" mandated by the UCCJA.

This becomes manifest by reading (Appendix B, p. 10a), together with section "14-13-104" as it appears in the UCCJA.

Searching at page 10a for the "six months" will prove to be a fruitless undertaking. It is conspicuous by its absence because in its place the Court of Appeals shows ...., Ellipsis.

The statute reads as follows:

"14-13-104. Jurisdiction. (1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(a) This state is the home state of the child at the time of commencement of the proceeding, or had been the child's home state within six months before commencement of the proceeding, and the child is absent from this state because of his removal or retention by a person claiming his custody or, for other reasons, and a parent or person acting as parent continues to live in this state; or

(b) It is...."
(Emphasis supplied)

Moreover, the sworn testimony of Mallory Ira Smith, respondent, father of Brian and Vanessa, at the hearing before Mr. Justice Kunzman of the Supreme Court of the State of New York, he concedes the fact that Colorado was not the "Home State" on December 5, 1979, (Appendix N, pp 75a-82a) is revealing, not concealing.

At page 76a, when the Court directly calls the attention of Mr. Smith,

> "that you are making, at this time, (June 20, 1979), plans to leave the jurisdiction of this Court. What that means in plan language is that you are moving out of the State of New York to move to another state.... First let me ask you is it your intention at the present time to remove yourself and your children from the jurisdiction on a permanent basis.
>
> THE WITNESS: No.
>
> THE COURT: Let me ask you this, Mr. Smith, you are now telling me that you will return with the children?
>
> THE WITNESS: Yes.

(p. 77a)

> THE COURT: You do not intend, nor will you remove the children from this jurisdiction other than for a vacation which will not exceed six to eight weeks?
>
> THE WITNESS: Correct.
>
> THE COURT: You realize that you are under oath?
>
> THE WITNESS: Yes.

THE COURT: This is what you are telling me.

THE WITNESS: Yes.

(p. 78a)

THE COURT: I am, now the question was, and please don't be evasive or super-technical in your response, the question is, when do you intend to leave on vacation?

THE WITNESS: July 7th.

THE COURT: ...I feel frankly, and I will indicate right now, that I am going to permit the children to be taken on vacation not to exceed six weeks and I do that and mention this (p. 79) right in my decision from the bench, that I do this relying on the sworn testimony under oath of this witness, Mr. Smith, that he will return to this jurisdiction with the children. Do you understand that, Mr. Smith?

THE WITNESS: Yes, I do. Thank you Your Honor."

At this juncture: Appendix D, pp 29a-37a, Appendix E, pp 38a-41a, Appendix F, pp 42a-45a, Appendix G, pp 46a-49a, considered together, establish the Federal right asserted by petitioners.

In addition, as the record at bar is unveiled, there appears to be no basis for the Judgment of the Court of Appeals to argue that the New York Courts no longer have jurisdiction of the subject matter. (Appendix J, pp 57a-67a) See also, UCCJA, Section 14-13-114, set forth in the Appendix.

(e)

THIS PETITION RAISES A SUBSTANTIAL QUESTION REQUIRING FULL BRIEFING AND ORAL ARGUMENT

The decision underlying the Judgment of the Court of Appeals is to avoid the Federal question, timely raised in the Courts in Colorado.

Here, there is a small case carrying a big issue of constitutional dimension. The new law, enacted by Congress on December 28, 1980, "The Parental Kidnapping Act of 1980" (Appendix L, pp 70a-71a, 28 U.S.C. 1738A), was called to the attention of the Court of

Appeals (Appendix J, pp 65a-66a).

It underscores the national interest with the "Questions Presented", at bar.

The basis set forth in the decision by the Court of Appeals is profoundly disturbing.

It cannot and does not withstand analysis. It does attempt, but hopefully, not, in the Supreme Court of the United States, to avoid the Federal right raised in the court below.

It is respectfully submitted that the instant case, in view of 28 USC 1738A, merits consideration at this time because new Federal statute does respond to the concurring opinion of Mr. Justice Rutledge, in Halvey v. Halvey, 330 U.S. 610, 619-620, stating:

....

...."The result seems unfortunate in that, apparently, it may make possible a continuing round of litigation over custody, perhaps also of abduction, between alienated parents. That consequence hardly can be thought conducive to the child's welfare. And, if possible, I would avoid such a distressing result, since I think that the controlling consideration should be the best interests of the child, not only for disposing of such cases as a matter of local policy, as it is in Florida and New York, but also for formulating federal policies of full faith and credit as well as of jurisdiction and due process in relation to such dispositions." (Emphasis Supplied)
(f)

The Supreme Court of the United States has stated many times that it assumes the duty of this Court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the Federal right has been waived.

(g)

It is in the background of the facts set forth in the case at bar, that the "Question Presented" merits review by this Court.

Also, it presents a substantial federal question vis-a-vis Halvey v. Halvey, supra, in focus with the new federal statute, 28 U.S.C. 1738A.

CONCLUSION

Probable Jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

APPENDIX A

CERTIORARI DENIED

IN THE
SUPREME COURT OF THE STATE OF COLORADO

No. 82 SC 48 January Term, 1982

HARVEY KUDLER and MARCIA KUDLER,	)	
Petitioners,	)	
vs.	)	Certiorari to the Colorado Court of
MALLORY IRA SMITH,	)	Appeals
Respondent,	)	No. 80CA1216
and regarding,	)	
BRIAN ALEXANDER SMITH and VANESSA LAUREN SMITH,	)	
Children.	)	

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals.

After review of the record, the briefs and the opinion of the Court of Appeals,

IT IS ORDERED by this Court that said petition be, and the same hereby is, denied. JUSTICE LOHR does not participate.

March 29, 1982 By the Supreme Court
Sitting En Banc

APPENDIX A

SUPREME COURT
STATE OF COLORADO
Certified to be a full,
true and correct copy

Mar 30 1982

COURT SEAL

DAVID W. BREZINA
Clerk of the Supreme Court
by K. Eldridge, Deputy Clerk

SUPREME COURT
STATE OF COLORADO SEAL

cc: Harvey Kudler
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Golden, CO 80401

Mac V. Danford, Clerk
Colorado Court of Appeals

APPENDIX B

JUDGMENT

COLORADO COURT OF APPEALS
No. 80CA1216

HARVEY KUDLER and
MARCIA KUDLER,
Petitioners-Appellants
v.
MALLORY IRA SMITH,
Respondent-Appellee,
and regarding
BRIAN ALEXANDER SMITH and
VANESSA LAUREN SMITH,
Children.

Appeal from the District Court of

Jefferson County

Honorable Joseph P. Lewis, Judge

DIVISION II
Opinion by JUDGE KELLEY JUDGMENT AFFIRMED
Enoch, C.J., and Van Cise, J., concur

Harvey Kudler, Pro Se

Maynard & Miller
Glen B. Maynard
Golden, Colorado

Attorneys for Respondent-Appellee

APPENDIX B

Marcia and Harvey Kudler of New York petitioned for enforcement and modification of a New York Supreme Court order granting them the right to visit their grandchildren, Brian and Vanessa Smith, who live in Colorado with their father, respondent Mallory Smith. The Kudlers appeal the Colorado trial court's determination under §19-1-116(4), C.R.S. 1973 (1980 Cum. Supp.) that the best interests of the children require denial of any visitation rights for the grandparents. We affirm.

The Kudlers' daughter, Judy, married Mallory Smith in 1968, and the couple had two children, Brian in 1969 and Vanessa in 1972. The Smiths separated in 1974, and the children went to live with the Kudlers because Judy was emotionally unstable and Mallory was working and attending school full time. Judy committed suicide in 1976, and in 1977, Mallory married Mary Lovell. In 1978, Mallory Smith regained legal custody of his children, and

in 1979, the Smiths moved from New York to Colorado.

The Kudlers have been suing Mallory Smith in one action or another since the day after his marriage to Judy. When Judy and Mallory separated and allowed the Kudlers to keep the children, the grandparents sued for custody and successfully limited the parents' visiting privileges. When Mallory won custody of his children in 1978, the Kudlers resisted their return until February 1979 by further legal action and by removal of the children from the New York court's jurisdiction.

Mallory obtained the permission of the New York court to take the children on a six-week vacation in Colorado, and when they failed to return, the Kudlers brought a habeas corpus action in New York which resulted in a bench warrant for Mallory's arrest. The Kudlers have also sued several times in federal court alleging violations

of the grandchildren's asserted constitutional rights to visit their grandparents. When the Kudlers located the Smiths in Colorado, they petitioned for enforcement and modification of the New York order granting them visitation rights every other Sunday.

The trial court denied visitation rights after hearing testimony of extreme dissension between the Kudlers and Mallory Smith. Mallory testified that, when he regained custody of his children, Brian had frequent temper tantrums and Vanessa had been told that "females are not supposed to be intellectual," but to be "dumb and pretty, . . . take care of the house and raise kids." He maintained that the Kudlers interrogated the children during their visits to compile incriminating evidence against Mallory. He further asserted that, by frequently criticizing Mallory, the Kudlers undermined his authority in the Smith household and

interfered with the Smiths' family harmony by revealing their disapproval of the marriage of Mallory, a Jew, to Mary, a Roman Catholic.

Because of the constant litigation, the children have been subjected to psychiatric examinations and have been taken from school by the police to appear in court. Mallory testified that the children showed signs of stress and strain after returning from visits with the Kudlers, and that old behavior problems would recur. The children became very upset when the Kudlers sent them a calendar marked with Judy's birth and death dates and the caption, "your mother is watching over you."

The trial court found that Mallory and Mary had established a good home for the children, who are doing well in school and leading healthy, normal lives. After reviewing evidence of the adverse effect of

APPENDIX B

the Kudlers on their grandchildren, the trial court denied all visitation rights under §19-1-116(4), C.R.S. 1973 (1980 Cum. Supp.).

Enacted in 1980, §19-1-116 enables a grandparent to seek a court order granting visitation rights when there has been a child custody case. The court may order visitation rights "only upon a finding that the visitation is in the best interests of the child." Section 19-1-116(2), C.R.S. 1973 (1980 Cum. Supp.). The court may also modify or terminate the grandparents' visitation rights "whenever such order would serve the best interests of the child." Section 19-1-116(4), C.R.S. 1973 (1980 Cum. Supp.).

The Kudlers originally petitioned in the district court for enforcement and modification of the New York Supreme Court order granting them visitation every other Sunday.

APPENDIX B

Then they moved to amend the petition to obtain visitation rights under §19-1-116, and the trial court granted the motion to amend.

On Appeal, the Kudlers contend that the trial court had jurisdiction to enforce their New York visitation order but was not empowered to terminate visitation rights. However, §19-1-116(4) specifically provides for termination of visitation rights, and since the Kudlers invoked the protection of that section, they cannot now change their theory and complain that the court had no jurisdiction under it. See Wickland v. Snyder, 39 Colo. App. 403, 565 p.2d 976 (1977).

Moreover, the trial court had the authority to modify the New York visitation order under the Uniform Child Custody Jurisdiction Action, §14-13-101, et seq., C.R.S. 1973 (UCCJA). Jurisdiction under

APPENDIX B

the UCCJA is governed by §14-13-104, C.R.S. 1973, which provides in relevant part:

> "A court of this state . . . has jurisdiction to make a child custody determination by initial or modification decree if: (a) this state is the home state of the child at the time of commencement of the proceedings . . . or (b) it is in the best interests of the child that a court of this state assume jurisdiction because the child and his parents ... have a significant connection with this state and there is available in this state substantial evidence concerning the child's present or future care, protection, training and personal relationship." Section 14-13-104(1).

Colorado has been the home state of the children since 1979, and substantial evidence concerning the children's future is available here, and not in New York. Modification of a New York custody decree by a Colorado court is permitted when New York no longer has the UCCJA jurisdictional prerequisites. Section 14-13-115(1), C.R.S. 1973.

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The Kudlers rely on In re Custody of Zumbrun, 42 Colo. App. 37, 592 P.2d 16 (1979), in which the trial court was held to have lacked jurisdiction to modify a New Mexico custody decree under §14-13-115, C.R.S. 1973. However, New Mexico was the "home state" of the children in that case, not Colorado, as in the instant case. When Colorado is the home state, Colorado has the jurisdiction to modify a sister state's decree in the best interests of the children.

The Kudlers further allege that there was no competent evidence that denial of grandparents' visitation rights would be in the best interests of the children. On the constrary, the testimony of Mallory Smith

concerning the adverse effect of the children'sprior visits with the Kudlers provided ample basis for the trial court's conclusion that the negative attitudes of the grandparents were injurious to the children. In addition, Harvey Kudler testified he felt the children should live with the Kudlers, and Marcia Kudler admitted having removed the children from the New York court's jurisdiction to prevent their return to Mallory Smith. With no guarantee that the grandparents would respect the father's wishes or even return the children, the trial court properly determined that denial of visitation was in the best interests of the children.

The judgment is affirmed.

CHIEF JUDGE ENOCH and JUDGE VAN CISE concur.

APPENDIX C

JUDGMENT OF DISTRICT COURT

IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No. 79 DR 3109, Div. 7

HARVEY KUDLER and MARCIA KUDLER, Petitioners, vs. MALLORY IRA SMITH, Respondent, and regarding, BRIAN ALEXANDER SMITH and VANESSA LAUREN SMITH, Children.	O R D E R

THIS MATTER having come on for hearing on Petitioners' Motion in re Visitation and Other Relief, as amended, and the Court having heard testimony and the statements of counsel, and the Court having made findings of fact and conclusions of law as set forth in the attached Reporter's Transcript, which

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transcript is incorporated in this order by this reference;

IT IS THEREFORE ORDERED that the Petitioners' Motion in re Visitation and Other Relief and Petitioners' Amended Petition be, and the same are hereby, DENIED.

DONE AND SIGNED the 20th day of August, 1980, nunc pro tunc, June 13, 1980.

BY THE COURT:

/s/
Joseph P. Lewis,
District Judge

PREPARED AS TO FORM:

MAYNARD & MILLER
Attorneys for Respondent

By Glen B. Maynard, #6660
Ridgewood Realty Building
14618 West Sixth Avenue
Golden, Colorado 80401
Phone: 278-1926

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APPROVED AS TO FORM:

BOHM, CONNELL and MCLELLAN
Attorneys for Petitioner

By Jerry C. Connell, #271
7475 West 5th Avenue, #100
Lakewood, Colorado 80226

APPENDIX C

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No. 79 DR 3109

HARVEY KUDLER and MARCIA KUDLER, Petitioners, vs. MALLORY IRA SMITH, Respondent, And Regarding, BRIAN ALEXANDER SMITH and VANESSA LAUREN SMITH, Children.	REPORTER'S TRANSCRIPT (Excerpt of Proceedings)

Cause comes on for hearing on motion regarding visitation before the Court on Friday, the thirteenth day of June, 1980, at the hour of 9:00 a.m., before the HONORABLE JOSEPH P. LEWIS, District Court Judge of Division 7, in and for the First Judicial

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District, County of Jefferson, State of Colorado.

A P P E A R A N C E S

MR. JERRY C. CONNELL, Attorney at Law, appeared on behalf of the Petitioners.

MR. GLEN B. MAYNARDa, Attorney at Law, appears on behalf of the Respondent.

WHEREUPON, the following proceedings were had, to wit:

(Whereupon, at the hour of 4:35 p.m., the following proceedings were had, to wit:)

THE COURT: This matter came on before the Court this date on the petition of the grandparents seeking rights to visit with grandchildren, grandchildren being residents and domiciled in this State with their natural father who obtained custody over the children from the Supreme Court in the State of New York. The Court has heard statements of counsel and testimony from the parties in regard to the visitation sought by the

grandparents. And for the record, in December of 1979, the parties came before the Court, but no Order was made by the Court at at that time. The grandparents are residents of Flushing, New York, that is the paternal grandparents as well as the -- that's the maternal grandparents rather. Paternal grandparents also reside in or about New York. I'm not sure of the exact place. At any rate, the natural mother of these children died sometime in 1974.

MR. CONNELL: Seventy-six, your Honor.

THE COURT: There was a separation in 1974, that's right. Her death was in 1976.

At the time that the natural father of these children was married to the daughter of petitioners in this case, the parties did have two children and they're Brian, now ten, and Vanessa, now seven. At the time the parties separated in 1974, the minor children did live with the grandparents for some time.

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At a later time, the natural father sought and was granted custody of his children. The Court in New York at that time allowed for visitation with the grandparents, the same petitioners who appear in this Court today.

From all of the testimony adduced today, the Court finds that these children, Brian and Vanessa, have been the subject of continued litigation and constant litigation brought by the grandparents. That there are still litigated matters yet existing in the State of New York, the status of the same this Court has no knowledge of because it was not testified to.

There was testimony that there is a warrant outstanding for the respondent father, and again the basis for the same is not known to the Court nor a part of the testimony today. There is testimony before the Court that there is a pending motion by the petitioners, the grandparents, for the

APPENDIX C

reopening of an appeal in the U.S. District Court, the Second Circuit, to reopen a defaulted matter concerning the same parties, referring to the parties and referring to the petitioner grandparents and the respondent, father.

It was not until after the separation of the natural father and his later deceased wife, the grandparents began caring for the children. The testimony is that petitioners, after the separation of '74, would not permit the natural mother to visit with the children. The respondent father testified that upon his receiving custody of the children in February of 1979, and that was pursuant to an Order of the New York Court, that Order appears to be dated May, '78, but there were numerous hearings in the matter, and the final hearing was not concluded until January the eleventh of 1979. And the father received the children from the grandparents in February of 1979.

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Subsequent to the time that the father received the children from the grandparents in February of 1979, the father moved with the children and his present wife to the State of Colorado. The father has testified that the children had many problems when he assumed custody over the children, that the son Brian was subjected to going into temper tantrums, that Vanessa was told by the grandparents that she's not to be an intellectual, but was to be a dumb, pretty girl, and just grow up and get married and have children.

The father testified that after a visit with the children in December here in Colorado, by the grandparents, the children were upset, that while dining at a restaurant, Brian was caused to ask the grandparents to stop asking him questions. The children have been subjected to psychiatric exams as a result of some of the actions brought in the various courts, that

the children constantly knew of the court hearings regarding them, that this has been testified by the father, has been upsetting the children, that it affected them mentally, that they were subject to great stress and strain. That the constant litigation was a factor which was upsetting to the children, both to their mental health and their physical well-being. And the father testified that petitioners have no respect for the father's intentions and well-being of the children. That the children are fine until visits with the grandparents and then all problems come again to the forefront.

After hearing in this Court in December of 1979, for which the Court made no final orders, the petitioners, that is the grandparents, sent a calendar to the children in this case. That calendar was marked showing the deceased mother's date of birth, her date of death and a statement thereon that the

deceased mother was watching over them.

From the testimony before the Court, the father has established a good home for the children, that the children are doing well in school, that they're benefiting from their present environment. They're leading a healthy and normal life. They're receiving love and care from their natural father as well as their stepmother, that their mental problems, when out of the presence of the grandparents, are none. These children shall not be subjected to the desires of the grandparents as to the manner of their being raised or to be thwarted in their intellectual endeavors and should be allowed to engage in other activities, to be able to fully become aware of all capabilities and opportunities for a full and good life.

The Court is aware of the recent statute which was a result of the amendment to Article I, Title 19, the Colorado Revised Statutes for

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1976, as amended, which is now referred to as 19-1-116 of the Colorado Revised Statutes. And the Court is aware of the statute and what it proposes. Referring to 19-1-116(2), it provides for hearing when so requested by either of the parties, and that hearing was held today. That hearing was held for the purpose of determining the best interests of these children, and it devolves upon the Court, pursuant to that section of the statute, at the conclusion of the hearing, to find whether it is in the best interests of the children to grand child visitation rights to the petitioning grandparents.

The Court has stated its findings and the Court now states the following conclusions. That these children are subject to being upset and anxious after visitation with the grandparents. That the grandparents' philosophy as to the intellectual learning, exclusive of other necessary learning

activities, that is sports activities, other school functions and all other matters to which children should be subjected to in order to determine what living is all about, as opposed to the philosophy of the father in this case; that the children should not be subjected to the desires of the grandparents in respect to the manner -- strike that -- in respect to the marriage of the father to his present wife, a Catholic, nor should the children be subjected to religious education of that desired by the grandparents when it is the sole right of the father to determine the religious education of the children. Children should not be exposed to religious education by both of the parties. That the exposure of the children to the negative attitutes of the grandparents toward the manner the father is raising the children in a home with a Catholic stepmother, are also the negative attitudes of the grandparents

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relating to the children concerning the father's long ago drug involvement, but most of the attitudes of the grandparents in relation to the children as it affects them in the relationship of their father are injurious to the children and not in their best interests.

There are various prejudices testified to that the grandparents have as to intellectual achievements of other activities and the constant litigation, subjecting the children to become frightened, insecure in their feelings and their mental being is adversely affected. That visitation by the children of the grandparents always, in the testimony, results in stress and strife among the children. All that is done by the father to bring them about again subjects these children to endure that which no children of their tender age should be subjected. And the Court concludes therefore that to grant

visitation to these grandparents under all the conditions which the Court has referred to and from all the testimony before the Court today, would not be in the best interests of these children and that --

MRS. KUDLER: Oh my god.

THE COURT: And that the petitioners seeking visitation of these grandchildren is denied.

MRS. KUDLER: May I address the Court?

THE COURT: No, you will not.

MRS. KUDLER: I think that you have done a terrible thing. You have family of your own and these things that he said were not true and we had no --

THE COURT: I have ruled.

The Court stands adjourned.

MRS. KUDLER: You made a big mistake. Someday you will be a grandfather and you will understand.

(Whereupon, the Court stood in recess.)

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REPORTER'S CERTIFICATE

I, Debra L. Powell, do hereby certify that the above and foregoing is a true and accurate transcript of my shorthand notes taken at the time and place as set forth on page one hereof.

DATED at Golden, Colorado, this 3rd day of July, 1980.

/s/
Debra L. Powell, C.S.R.

APPENDIX D

NEW YORK JUDGMENT

JUDGMENT OF NEW YORK SUPREME COURT
DATED May 1, 1978

At a Special Term
Part II of the Supreme
Court of the State of
New York, County of
Queens, located at
88-11 Sutphin Blvd.,
Jamaica, New York, on
the 1st day of May,
1978.

P R E S E N T :

HON. ANGELO GRACI,

Justice.

----------X

PEOPLE EX REL:

MALLORY SMITH,

Petitioner,

-against-

HARVEY KUDLER and
MARCIA KUDLER,

Respondents.

JUDGEMENT
INDEX:
7496/77

----------X

A petition having been duly made by the above named MALLORY SMITH, for a writ of habeas corpus, such petition having been

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duly verified on the 27th day of May 1977, and a writ having been thereupon duly allowed by the Hon. NICHOLAS FERRARO, Justice of the Supreme Court, County of Queens on the 27th day of May 1977, and the respondents HARVEY KUDLER and MARCIA KUDLER having been duly commanded by such writ to have the bodies of the children BRIAN ALEXANDER SMITH and VANESSA LAUREN SMITH before Special Term Part II of the Supreme Court, County of Queens held at 88-11 Stuphin Blvd., Jamaica, New York, on the 2nd day of June 1977, and the said respondents having duly appeared at such Special Term, and the matter having come on by way of order to show cause, on the 9th day of June 1977, and the Court having made an interim order dated June 10, 1977, appointing a psychiatrist to examine all parties and granting visitation of the children to the petitioner, and the matter having been

APPENDIX D

adjourned at various times until December 19, 1977, and a hearing having commenced on such date and all the issues raised by the petitioner in the proceedings on the one hand and by the respondents on the other hand having duly come on to be heard on the 19th day of December 1977 at Special Term Part II of this Court before HON. ANGELO GRACI, Justice, and the petitioner having appeared in person and by his attorney WALTER E. ANDEROCCI, and the respondents having appeared in person and by their attorneys CORRADO & CORRADO ESQS. by PEARL B. CORRADO Esq. of counsel, and the hearing thereafter continued on the 21st, 22nd, 23rd, and 28th days of December 1977 and further continued on the 3rd, 4th, 9th, 10th and 11th days of January 1978, and the hearing having been concluded on the 11th day of January 1978, and after hearing the allegations and proofs of the parties and

APPENDIX D

the witnesses called by both sides, and due deliberation having been had and the Court having made and filed two written decisions, one on the 15th day of March 1978 and the other on the 13th day of April 1978,

Now, on motion of WALTER E. ANDEROCCI, attorney for the petitioner, MALLORY SMITH, it is

ORDERED AND ADJUDGED that the writ of habeas corpus dated the 27th day of May 1977, be and the same is hereby sustained; and it is further

ORDERED AND ADJUDGED that the custody of the two minor children, BRIAN ALEXANDER SMITH and VANESSA LAUREN SMITH, be awarded to the petitioner father, MALLORY SMITH and that such custody shall commence within ten (10) days following service on the respondents of a copy of the judgement to be entered herein with notice of entry thereof; and it is further

APPENDIX D

ORDERED AND ADJUDGED that the respondents HARVEY KUDLER and MARCIA KUDLER, the maternal grandparents of the infant children shall having visitation with the children commencing with the second Sunday following entry of the judgement to be entered herein, and shall continue every other Sunday thereafter; the children shall be picked up at 10 A.M. on each visitation day and returned to their custodial home at 6 P.M. in the evening of that day; and it is further

ORDERED AND ADJUDGED that the grandparents shall notify the father, MALLORY SMITH, at least 24 hours prior to such visiting day of their intent to avail themselves of such visitation right and if the grandparents shall fail to pick up the children by 11 A.M., of their visitation day, then it shall be deemed that they have waived their right to visitation for that day; and

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it is further

ORDERED AND ADJUDGED that if such visitation day shall fall on a birthday of one of the children or on a religious holiday, then the scheduled visitation day for both children shall be deferred to the following Sunday and shall continue on alternate Sundays thereafter; and it is further

ORDERED AND ADJUDGED that if such visitation day shall occur during a period when the petitioner father shall desire to take a vacation with his family away from his home, then the scheduled visitation day shall be deferred to the Sunday following such vacation period and shall continue on alternate Sundays thereafter but in no event shall such vacation period or periods total more than four weeks during a year and the petitioner shall notify the grandparents at least two weeks prior to each intended vacation period of his intent with respect

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to the children; and it is further

ORDERED AND ADJUDGED that should the children be away from home at either a school or a summer camp, then the rights of the grandparents to visit with them shall be similar to those as if they were residing at home with the petitioner father as provided herein, and the grandparents may visit the children at the said school or summer camp on the scheduled visitation days provided such Sundays are the regular or scheduled visiting days for relatives of the children at said school or summer camp; and it is further

ORDERED AND ADJUDGED that the respondent grandparents may have such visitation as the parties may agree upon.

ENTER

/s/ Angelo Graci
J. S. C.

Granted May 1, 1978
John J. Durante
Clerk

APPENDIX D

EXEMPLIFIED COPY OF JUDGMENT

QUEENS COUNTY CLERK
88-11 Sutphin Boulevard
Jamaica, New York 11435

THE PEOPLE OF THE STATE OF NEW YORK,

BY THE GRACE OF GOD FREE AND INDEPENDENT,

TO all to whom these Presents may come, GREETING:

KNOW YE, That We, having examined the files and records in the office of the Clerk of the County of Queens, State of New York, and Clerk of the Supreme Court of said State, in and for said County, Do Find a certain record consisting of a Judgment signed by the Hon. Angelo Graci of this Court on May 1, 1978 at a Special Term of the Supreme Court of the State of New York, County of Queens, in the matter of People ex rel: Mallory Smith, Petitioner against Harvey Kudler and Marcia Kudler, Respondents, filed in the Office of the Queens County Clerk on May 4, 1978 under Index Number 7496 of 1977.

remaining there on file in the words and figures following, to wit:
(True Copy attached.)

APPENDIX E
WARRANT OF ATTACHMENT

ATTACHED TO PETITION FOR
FOR WRIT OF HABEAS CORPUS IN COLORADO

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

----------x

PEOPLE EX REL:

HARVEY and
MARCIA KUDLER,

Petitioners,

-against-

MALLORY SMITH,

Respondent.

Index No.
7952/79

WARRANT OF
ATTACHMENT

----------x

THE STATE OF NEW YORK

TO: Sheriff of the City of New York, County of Queens or the Sheriff of any county where the respondent hereinafter named can be found.

GREETINGS:

WHEREAS, a Writ of Habeus Corpus was duly issued by this Court on the 7th day of June 1979 directed to Mallory Smith

APPENDIX E

requiring and commanding him to have the bodies of Brian Alexander Smith and Vanessa Lauren Smith by him imprisoned and detained as it was said, together with the time and cause of such imprisonment and detention, by whatever name the said Mallory Smith was called or charged, before this Court at a Special Term, Part II, thereof, to be held at Supreme Court, Queens County, located at 88-11 Sutphin Boulevard, Jamaica, New York, on the 11th day of June, 1979 and the matter having been adjourned to the 20th day of June, 1979 and the matter being set down to be heard on the 27th day of September, 1979, to do and receive what then and there be considered concerning Brian Alexander and Vanessa Lauren Smith.

AND WHEREAS the respondent, Mallory Smith, did not answer on said date for hearing on the writ,

APPENDIX E

AND WHEREAS the said Mallory Smith failed to obey the said writ and to produce the said infants, Brian Alexander and Vanessa Lauren Smith, as therein required, and no sufficient cause having been shown for such refusal or neglect,

NOW, THEREFORE, you are hereby commanded forthwith to apprehend the said Mallory Smith and bring him before the Justice presiding at Special Term, Part II, of the Supreme Court, County of Queens at 88-11 Sutphin Boulevard, Jamaica, New York, Courtroom 67, between the hours of 9:00 a.m. and 5:00 p.m., or, if the Court be not in session, at the next reopening thereof.

AND have you then and there this warrant.

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WITNESS JOSEPH J. JUNZEMAN one of the Justices of this Court at the courthouse at Jamaica, New York on the 9th day of October, 1979.

/s/ Joseph J. Kunzeman
Justice of the
Supreme Court

s/ DELSON & GORDON
230 Park Avenue
New York, New York 10017
(212) 661-9800

APPENDIX F

AFFIDAVIT IN SUPPORT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

----------x

PEOPLE EX REL:

HARVEY and
Marcia Kudler,

Petitioners,

-against-

MALLORY SMITH,

Respondent.

Index No.
7952/79

AFFIDAVIT IN
SUPPORT OF WARRANT
OF ATTACHMENT

----------x

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

ALVIN H. MEADOW, being duly sworn, deposes and says:

1. That I am an attorney and counselor at law duly admitted to practice in the courts of the State of New York and a member of the firm of Delson & Gordon, attorneys for the petitioners herein, Harvey and Marcia Kudler.

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2. This affidavit is submitted in support of a warrant of attachment in the above-entitled matter pursuant to the direction of the Honorable Joseph T. Kunzeman, Justice of the Supreme Court, Queens County.

3. A writ of habeas corpus herein directed to Mallory Smith requiring and commanding him to have and produce the bodies of Brian Alexander Smith and Vanessa Lauren Smith by him imprisoned and detained, as it was said, together with the time and cause of such imprisonment and detention, by whatever name the said Mallory Smith was called or charged, before this Court at a Special Term, Part II, thereof, to be held at the Supreme Court, Queens County, located at 88-11 Sutphin Boulevard, Jamaica, New York on the 11th day of June, 1979 and the matter having been adjourned to the 20th day of June, 1979 and the matter having been set down to be heard on the 27th day of

APPENDIX F

September, 1979 by the Honorable Joseph J. Kunzeman, Justice of the Supreme Court, Queens County, and the said Mallory Smith failed to obey the said writ and to produce the said infants, Brian Alexander and Vanessa Lauren Smith as he was required to do and no sufficient cause having been shown for such refusal or neglect.

NOW, THEREFORE, it is respectfully requested that the Court direct the issuance of a warrant directed to the Sheriff of the City of New York, County of Queens, or the Sheriff of any other county where the said Mallory Smith, Brian Alexander Smith or Vanessa Lauren Smith can be found and further directing said Sheriff to bring the named persons before the justice presiding at Special Term, Part II, Supreme Court, Queens County at 88-11 Sutphin Boulevard, Jamaica, New York, Courtroom 67 between

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the hours of 9:00 a.m. and 5:00 p.m. or, in the event the Court be not in session, at the next reopening thereof and further that the Court grant such other and further relief as the Court deems proper in the premises.

/s/ Alvin H. Meadow

Sworn to before me this

8th day of October, 1979

/s/ Amelia A. Erbar
Commissioner of Deeds
City of New York 41268
Certified in New York County
Commission Expires Jan. 1, 1980

APPENDIX G

HABEAS CORPUS

WRIT OF HABEAS CORPUS DATED DECEMBER 5, 1979 IN COLORADO

IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No. 79DR3109

HARVEY KUDLER and MARCIA KUDLER, Petitioners, vs. MALLORY IRA SMITH, Respondent, And Regarding BRIAN ALEXANDER SMITH and VANESSA LAUREN SMITH, Children.	WRIT OF HABEAS CORPUS

TO THE SHERIFF OF THE COUNTY OF JEFFERSON, STATE OF COLORADO, OR ANY SHERIFF OR PEACE OFFICER WITHIN THE STATE OF COLORADO, WHEREIN MALLORY IRA SMITH OR BRIAN ALEXANDER SMITH AND VANESSA LAUREN SMITH MAY BE FOUND:

WHEREAS, the attached motion of Harvey

APPENDIX G

Kudler duly verified by his affidavit, has been presented to the District Court of the County of Jefferson, State of Colorado; and

WHEREAS, the Court finds that the children, Brian Alexander Smith and Vanessa Lauren Smith, are not committed or retained for any criminal or supposedly criminal matter and are confined and restrained of their liberty under the color and pretense of the Respondent, Mallory Ira Smith, preventing them from exercising their rights of visitation to and with the Petitioners herein, which said rights are vested by a valid order of a sister state, to-wit: the Supreme Court of the State of New York, County of Queens, in an action entitled People Ex Rel: Mallory Smith, Petitioner, against Harvey Kudler and Marcia Kudler, Respondents, Judgement Index: 7496/77, and

APPENDIX G

the Petitioners' grandchildren have no adequate or speedy relief at law and unless such writ be granted as prayed for, the Petitioners will suffer irreparable injury.

THESE ARE, THEREFORE, BY AUTHORITY OF THE STATE OF COLORADO, TO COMMAND YOU TO LEAVE A TRUE AND ATTESTED COPY OF SAID MOTION AND OF THIS WRIT WITH SAID MALLORY IRA SMITH OF 5500 West 56th Avenue, Space 87, Arvada, Colorado, OR ANY OTHER PLACE WHERE HE MAY BE FOUND, AND WITH ANY PERSON OR PERSONS ACTING UNDER THE AGENCY OR AUTHORITY OF THE MALLORY IRA SMITH IN WHOSE PRESENCE THE CHILDREN MAY BE FOUND:

IT IS FURTHER ORDERED THAT YOU, MALLORY IRA SMITH, AND ANY OTHER PERSON ACTING UNDER HIS AGENCY OR EMPLOYEE HOLDING THE PERSONS OF THE SAID CHILDREN TO FORTHWITH APPEAR BEFORE THIS COURT IMMEDIATELY UPON THE SERVICE OF THIS WRIT UPON YOU AND BRING WITH YOU AT THE TIME THE PERSONS OF THE CHILDREN, BRIAN ALEXANDER SMITH AND VANESSA LAUREN SMITH, AND THEN AND THERE TO MAKE ANSWER TO THIS WRIT.

Anyone having a person in his custody or under his restraint, power, or control for whose relief a writ of habeas corpus is issued who, with the intent to avoid the effect of such writ, transfers such person to the custody, or places him under the

APPENDIX G

control, of another or conceals him or changes the place of his confinement with intent to avoid the operation of such a writ or with intent to remove him out of this state commits a class 5 felony and shall be punished as provided in section 18-1-105, C.R.S. 1973.

THE FOREGOING YOU WILL NOT OMIT UNDER PENALTY OF LAW.

DATED at Golden, Colorado this 5 day of December, 1979.

BY THE COURT:

JOSEPH P. LEWIS
District Court Judge

DISTRICT COURT
County of Jefferson, Colorado
Certified to be full, true and correct copy of the original in my custody
JANET M. SCHERF
Clerk of the District Court
By /s/ LaVonne M. Bloom
Deputy Clerk

APPENDIX H

MOTION TO AMEND

ADDITION TO PETITION ON JUNE 12, 1980, ORALLY GRANTED BY JUDGE LEWIS

IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No. 79 DR 3109, Div. 7

HARVEY KUDLER and MARCIA KUDLER, Petitioners, vs. MALLORY IRA SMITH, Respondent, and regarding BRIAN ALEXANDER SMITH and VANESSA LAUREN SMITH, Children.	MOTION TO AMEND PETITION

COMES NOW the above named Petitioners, by and through their attorney of record, Jerry C. Connell, and moves this Honorable Court for an Order allowing the Petitioners to amend the Petition on file herein and

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SHOWS AS GROUNDS THE FOLLOWING:

1. The original Petition on file before this Court asserts a claim on the part of the Petitioners against the Respondent for visitation with two minor children who are children of the Respondent and grandchildren of the Petitioners.

2. The basis of such claim on the part of the Petitioners was, and still is, that such visitation had been ordered by the Supreme Court of the State of New York and that such order was entitled to full faith and credit under the applicable provisions of the United States Constitution. As further grounds, the Petitioners urge that they are entitled to such visitation as a matter of public policy established within the State of Colorado.

3. Subsequent to the filing of the Petition, the 1980 Colorado State Legislature in Senate Bill No. 124 enacted a new section to Article I of Title 19 of the Colorado

APPENDIX H

Revised Statutes of 1973 as amended, a copy of which is attached hereto and made a part hereof.

4. That the statute so amended was signed into law by the Governor of the State of Colorado on the 10th day of April, 1980.

5. That the statute so referred to, by legislation, creates an additional claim for such visitation on the part of the Petitioners herein.

WHEREFORE, Petitioners pray an Order allowing the Petition to be amended to reflect the additional claim for visitation as provided for by law.

Respectfully submitted:

/s/ Jerry C. Connell
Reg. No. 271
BOHM, CONNELL AND MC LELLAN
Attorney for
Petitioners
7475 W. Fifth Ave.,
Suite 100
Lakewood, Colorado 80226
Telephone: 232-1900

APPENDIX I

AMENDED PETITION

IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No. 70 DR 3109, Div. 7

HARVEY KUDLER and MARCIA KUDLER, Petitioners, vs. MALLORY IRA SMITH, Respondent, and regarding BRIAN ALEXANDER SMITH and VANESSA LAUREN SMITH, Children.	AMENDED PETITION

COMES NOW the above named Petitioners, by and through their attorney of record, Jerry C. Connell, and show the Court as follows:

1. The Petitioners are the maternal grandparents of the children, Brian Alexander Smith and Vanessa Lauren Smith,

APPENDIX I

and as such have been granted certain vested rights of visitation with the minor children under a valid and existing order and judgement of the Supreme Court of the State of New York, County of Queens, entitled People ex rel: Mallory Smith, Petitioner, against Harvey Kudler and Marcia Kudler, Respondents, Judgement Index: 7496-77, an exemplified copy of which is presently on file with this Court.

2. The mother of the children, Judith Smith, nee Kudler, has died. Due to extreme and deep personal differences between the Respondent, Mallory Ira Smith, and the Petitioners herein, the Petitioners have been constantly and consistently refused visitation or access to the children by the Respondent.

3. The Respondent and the children presently reside at 5500 W. 56th Ave.,

APPENDIX I

Apartment No. 87, Arvada, Colorado and the venue is proper in this county.

4. That by virtue of C.R.S. 19-1-116, 1973, as amended, the Petitioners are entitled to such visitation.

WHEREFORE, Petitioners pray that this Honorable Court make such Orders as may be necessary to enforce the provisions of the judgement and order rendered by the Supreme Court of the State of New York and the actions as set forth herein and, further, under the provisions of the Colorado Revised Statute quoted hereinabove, that this Court make inquiry into the matters set forth herein and render such judgement and orders as are necessary to allow the Petitioners herein to obtain such visitation under the terms and conditions as may be decreed just in the premises.

Respectfully submitted:

/s/ Jerry C. Connell

APPENDIX I

Jerry C. Connell -
Reg. No. 271
BOHM, CONNELL AND MC LELLAN
Attorneys for Petitioners
7475 W. Fifth Ave.,
Suite 100
Lakewood, Colorado 80226
Telephone: 232-1900

APPENDIX J

REHEARING PETITION

PETITION DATED DECEMBER 18, 1981, FOR REHEARING AFTER AFFIRMANCE BY

COLORADO COURT OF APPEALS

NO. 80CA1216

----------x

HARVEY KUDLER and
MARCIA KUDLER,

Petitioners-Appellants,

vs.

MALLORY IRA SMITH,

Respondent-Appellee,

and regarding

BRIAN ALEXANDER SMITH and
VANESSA LAUREN SMITH,

Children.

PETITION FOR REHEARING RE: OPINION FILED, OCTOBER 29, 1981, AFFIRMING JUDGMENT

----------x

GROUNDS FOR REHEARING

QUESTIONS PRESENTED

1. Whether this Court overlooked a substantial federal question raised by petitioners-appellants, at all stages of the within proceeding from the Writ of

APPENDIX J

Habeas Corpus to the rendering of the trial court's opinion and the judgment based therein?

2. Whether this Court is correct in its determination that the trial court below acted pursuant to the authority of the provisions of sections 14-13-114 and 14-13-115, C.R.S. 1973, in terminating the visitation rights granted to petitioners-appellants by the New York Decree?

STATEMENT

As the record is unveiled, it appears that jurisdiction of the parties in this proceeding commenced with the issuance of the Writ of Habeas Corpus, dated December 5, 1979, generating a hearing before Hon. Joseph P. Lewis, the same date, more particularly set forth in petitioners-appellants main brief at pages 4-5, 7-9.

At another hearing on June 12, 1979, held before the trial court below, (see

APPENDIX J

page 11 of petitioners-appellants main brief), continuous recognition is given by Honorable Joseph P. Lewis, trial judge, with respect to the efficacy of the New York Decree, stating:

> "The Court: Well, I reviewed the Order from New York, which allowed visitation. It provided for 24 hours notice prior to the day of visitation. That's the only order thus far, as far as any visitation is concerned."

The Court below, in its oral opinion which culminated in the judgment appealed from, gave full faith and credit to part of the judgment of the Supreme Court of the State of New York.

On its face said judgment provided (1) for custody of the children to Mallory Ira Smith, father, and, in the same judgment, granted visitation rights with the children to the maternal grandparents, petitioners-appellants at bar.

APPENDIX J

In plain words, the court below, knowing that there is only one judgment from the State of New York, bifurcated that judgment, in violation of the rights of the petitioners-appellants under Article IV, §1 of the United States Constitution.

In Davis v. Davis, 305 U.S. 32, 39-40, the court stated:

APPENDIX J

"Art. IV, §1, requires that judicial proceedings in each State shall be given full faith and credit in the courts of every other State. The Act of May 26, 1790, 1 Stat. 122, as amended, R.S. §905, 28 U.S.C. §687, declares that judicial proceedings authenticated as there provided shall have such faith and credit given to them in every 'court within the United States as they have by law or usage in the courts of the State from which they are taken.' Thus Congress rightly interpreted the clause to mean, not some, but full credit. Haddock v. Haddock, supra 567. The Act extended the rule of the Constitution to all courts, federal as well as state, Mills v. Duryee, 7 Cr.481, 485."[1]

. . . . . .

[1] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Act, Records and Proceedings shall be proved, and the Effect thereof."

APPENDIX J

POINT I

The Decree of New York Court, awarding custody of the children to the father, and visitation rights to the grandparents, is entitled to full faith and credit in whole part.

In Haddock v. Haddock, 201 U.S. 562, 567, the court stated:

> "First. The requirement of the Constitution is not that some, but that full, faith and credit shall be given by States to the judicial decrees of other States. That is to say, where a decree rendered in one State is embraced by the full faith and credit clause that constitutional provision commands that the other States shall give to the decree the force and effect to which it was entitled in the State where rendered. Harding v. Harding, 198 U.S. 317."

In Halvey v. Halvey, 330 U.S. 610, 614, the court stated:

> "So far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do. Article IV, §1 of

the Constitution provides that 'Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.' Congress by the Act of May 26, 1790, c.11, as amended, R.S. §905, 28 U.S.C. §687 declared that judgments 'shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.' The general rule is that this command requires the judgment of a sister State to be given full, not partial, credit in the State of the Forum. See Davis v. Davis, 305 U.S. 32; Williams v. North Carolina, 317 U.S. 287."

In Williams v. North Carolina, 317 U.S. 287, 293, the court stated:

"Article IV, §1 of the Constitution not only directs that 'Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State' but also provides that 'Congress may be general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.' Congress has exercised that power."

APPENDIX J

POINT II

THE TRIAL COURT HAD NO POWER TO TERMINATE VISITATION RIGHTS GRANTED UNDER THE NEW YORK DECREE

(a)

It is plain and clear, without any area for dispute or challenge: that the trial court in support of the judgment appealed from, totally disregarded the provisions of sections 14-13-114 and 14-13-115, C.R.S. 1973, by confining his decision and judgment wholly and solely under §19-1-116(4) C.R.S. 1973 (1980 Cum. Supp.).

The main brief of petitioners-appellants contends that under the applicable law of the State of Colorado, the trial court lacked the power to elide the Petition and deem the enforcement of visitation rights, as not being an issue presented to the Court. (To that effect, see Main Brief submitted to the Court of Appeals, pp. 1-2, 5-7, 9, 11, 14-18,

and, also, Reply Brief, p. 6, citing the case of Macaluso v. Easley, 81 Colo. 50, 253 P.397.

(b)

This Petition for Rehearing is the first opportunity for petitioners-appellants to ask the Court of Appeals to consider the applicability: of the Federal jurisdictional statute enacted by Congress and made into law by the signature of President Carter, to the record at bar.

(c)

Said statute is known as "Parental Kidnapping Prevention Act of 1980" (U.S. Code, tit 28 §1738A, Public Law 96-611).

The pertinent section of that law to the facts at bar is subsection (f) which, in full, reads as follows:

> "(f). A court of a State may modify a determination of the custody of the same child made by a court of another State, if--

APPENDIX J

"(1) it has jurisdiction to make such a child custody determination; and

"(2) the court of the other State no longer has jurisdiction or it has declined to exercise such jurisdiction to modify such determination."

(U.S. Code, tit. 28, §1738A)

CONCLUSION

(a)

It cannot be gainsaid that a reading of the pleadings and the testimony at the trial shows that under said statute PKPA, supra, the necessary jurisdictional requirement for modification of the New York decree made by the court below, is lacking.

(b)

The Petition, the Writ of Attachment, the Affidavit in Support of the Writ of Attachment, the testimony in the record at bar of December 5, 1979, June 12, 1979, and June 13, 1979, and the Writ of Habeas Corpus, dated December 5, 1979, reveals a continuous jurisdiction by the Supreme Court of the

APPENDIX J

State of New York, County of Queens, to the end of effectuating and enforcing the decree of the State of New York.

December 18, 1981 Respectfully submitted,

/s/ HARVEY KUDLER, Pro Se
178-06 69th Avenue
Fresh Meadows, New York
11365
(212) 969-7963

CERTIFICATE OF SERVICE

I hereby certify that I have this 18 day of December, 1981, served the documents listed within by mailing true and correct copies thereof to counsel for respondents, Glen B. Maynard, and to the Clerk of the Court of Appeals, by depositing same in the United States Mail, postage prepaid, registered mail, addressed as follows:

Glen B. Maynard, Esq.
Ridgewood Realty Building
14618 West Sixth Avenue
Golden, Colorado 80401

Clerk
Colorado Court of Appeals
Denver, Colorado 80203

APPENDIX K

REHEARING DENIED

PETITION DENIED FOR REHEARING

IN THE COURT OF APPEALS OF THE STATE OF COLORADO

Case Number 80CA1216

HARVEY KUDLER and MARCIA KUDLER, Petitioners-Appellants, vs. MALLORY IRA SMITH, Respondent-Appellee, and regarding BRIAN ALEXANDER SMITH and VANESSA LAUREN SMITH, Children.	O R D E R

Upon consideration of the Petition for Rehearing filed by the Appellant herein, said Petition is hereby DENIED. Unless otherwise ordered, mandate will issue January 7, 1982.

APPENDIX K

BY THE COURT, Judge Kelly, Enoch, C.J. and Van Cise, J.

Dated: December 31, 1981

COPIES MAILED TO:
COUNSEL OF RECORD
ON: 12/31/81
BY: /s/ J. Zimmerman
COLORADO COURT OF APPEALS

SEAL
COURT OF APPEALS
COLORADO

If certiorari to the Supreme Court is planned and a stay of issuance of mandate desired, petition for such stay must be filed in the Court of Appeals prior to the above date of issue.

APPENDIX L

28 U.S.C. §1738A

Title 28 U.S.C. §1738A

Sec.
1738A. Full faith and credit given to child custody determinations.

1980 Amendment. Pub.L. 96-611, § 8(b), Dec. 28, 1980, 94 Stat. 3571, added item 1738A.

§ 1738A. Full faith and credit given to child custody determinations

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term—

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child; and

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if—

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

APPENDIX L

(B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

(D)(i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if—

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is

APPENDIX L

exercising jurisdiction consistently with the provisions of this section to make a custody determination.

Added Pub.L. 96-611, § 8(a), Dec. 28, 1980, 94 Stat. 3569.

Congressional Findings and Declaration of Purposes for Parental Kidnapping Prevention Act of 1980 [Pub.L. 96-611]. Section 7 of Pub.L. 96-611 provided that:

"(a) The Congress finds that—

"(1) there is a large and growing number of cases annually involving disputes between persons claiming rights of custody and visitation of children under the laws, and in the courts, of different States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States;

"(2) the laws and practices by which the courts of those jurisdictions determine their jurisdiction to decide such disputes, and the effect to be given the decisions of such disputes by the courts of other jurisdictions, are often inconsistent and conflicting;

"(3) those characteristics of the law and practice in such cases, along with the limits imposed by a Federal system on the authority of each such jurisdiction to conduct investigations and take other actions outside its own boundaries, contribute to a tendency of parties involved in such disputes to frequently resort to the seizure, restraint, concealment, and interstate transportation of children, the disregard of court orders, excessive relitigation of cases, obtaining of conflicting orders by the courts of various jurisdictions, and interstate travel and communication that is so expensive and time consuming as to disrupt their occupations and commercial activities; and

"(4) among the results of those conditions and activities are the failure of the courts of such jurisdictions to give full faith and credit to the judicial proceedings of the other jurisdictions, the deprivation of rights of liberty and property without due process of law, burdens on commerce among such jurisdictions and with foreign nations, and harm to the welfare of children and their parents and other custodians.

"(b) For those reasons it is necessary to establish a national system for locating parents and children who travel from one such jurisdiction to another and are concealed in connection with such disputes, and to establish national standards under which the courts of such jurisdictions will determine their jurisdiction to decide such disputes and the effect to be given by each such jurisdiction to such decisions by the courts of other such jurisdictions.

"(c) The general purposes of sections 6 to 10 of this Act [enacting this section and sections 654(17) and 663 of Title 42, The Public Health and Welfare, amending section 655(a) of Title 42, and enacting provisions set out as notes under this section and sections 663 of Title 42 and 1073 of Title 18, Crimes and Criminal Procedure] are to—

"(1) promote cooperation between State courts to the end that a determination of custody and visitation is rendered in the State which can best decide the case in the interest of the child;

"(2) promote and expand the exchange of information and other forms of mutual assistance between States which are concerned with the same child;

"(3) facilitate the enforcement of custody and visitation decrees of sister States;

"(4) discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

"(5) avoid jurisdictional competition and conflict between State courts in matters of child custody and visitation which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being; and

"(6) deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards."

State Court Proceedings for Custody Determinations; Priority Treatment; Fees, Costs, and Other Expenses. Section 8(c) of Pub.L. 96-611 provided that: "In furtherance of the purposes of section 1738A of title 28, United States Code [this section], as added by subsection (a) of this section, State courts are encouraged to

"(1) afford priority to proceedings for custody determinations; and

"(2) award to the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of such section 1738A [this section], necessary travel expenses, attorneys' fees, costs of private investigations, witness fees or expenses, and other expenses incurred in connection with such custody determination in any case in which—

"(A) a contestant has, without the consent of the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of such section 1738A [this section], (i) wrongfully removed the child from the physical custody of such person, or (ii) wrongfully retained the child after a visit or other temporary relinquishment of physical custody; or

"(B) the court determines it is appropriate."

APPENDIX M

STATUTE BASIS FOR DISTRICT COURT

COLORADO STATUTE IN DISTRICT COURT DECISION

AN ACT

CONCERNING VISITATION RIGHTS OF GRANDPARENTS.

Be it enacted by the General Assembly of the State of Colorado:

Section 1. Article 1 of title 19, Colorado Revised Statutes 1973, 1978 Repl. Vol., as amended, is amended BY THE ADDITION OF A NEW SECTION to read:

19-1-116. Visitation rights of grandparents. (1) Any grandparent of a child may, in the manner set forth in this section, seek a court order granting him reasonable grandchild visitation rights when there is or has been a child custody case. Because cases arise which do not directly deal with child custody but nonetheless have an impact on the custody of a child, for the purposes of this section, a "child custody case" includes any of the following, whether or not child custody was specifically an issue:

(a) The marriage of the child's parents has been declared invalid or has been dissolved by a court or a court has entered a decree of legal separation with regard to such marriage;

(b) Legal custody of the child has been given to a party other than the child's parent or the child has been placed outside of and does not reside in the home of his parent, excluding any child who has been placed for adoption or whose adoption has been legally finalized; or

(c) The child's parent, who is the child of the grandparent, has died.

(2) A party seeking a grandchild visitation order shall submit, together with his motion for visitation, to the district court for the district in which the child resides an affidavit setting forth facts supporting the requested order and shall give notice, together with a copy of his affidavit, to the party who

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

APPENDIX M

has legal custody of the child. The party with legal custody may file opposing affidavits. If neither party requests a hearing, the court shall enter an order granting grandchild visitation rights to the petitioning grandparent only upon a finding that the visitation is in the best interests of the child. A hearing shall be held if either party so requests or if it appears to the court that it is in the best interests of the child that a hearing be held. At the hearing, parties submitting affidavits shall be allowed an opportunity to be heard. If, at the conclusion of the hearing, the court finds it is in the best interests of the child to grant grandchild visitation rights to the petitioning grandparent, the court shall enter an order granting such rights.

(3) No grandparent may file an affidavit seeking an order granting grandchild visitation rights more than once every two years absent a showing of good cause. If the court finds there is good cause to file more than one such affidavit, it shall allow such additional affidavit to be filed and shall consider it. The court may order reasonable attorney fees to the prevailing party. The court may not make any order restricting the movement of the child if such restriction is solely for the purpose of allowing the grandparent the opportunity to exercise his grandchild visitation rights.

(4) The court may make an order modifying or terminating grandchild visitation rights whenever such order would serve the best interests of the child.

Section 2. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: April 10, 1980

APPENDIX N
EXCERPTS OF JUNE 20, 1979 HEARING IN NEW YORK STATE

EXTRACTS OF MINUTES TAKEN BY DOLORES E. CONSTANZA, OFFICIAL COURT REPORTER, IN THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF QUEENS, DATED JUNE 20, 1979, BEFORE HONORABLE JOSEPH J. KUNZEMAN, JUSTICE OF SUPREME COURT OF STATE OF NEW YORK, COUNTY OF QUEENS, WHO SIGNED WARRANT OF ATTACHMENT REPRODUCED AS APPENDIX IN PETITION TO THE SUPREME COURT OF THE UNITED STATES

Appearances of the attorneys:

"ALVIN H. MEADOW, ESQ.
MESSRS. DELSON AND GORDON
230 PARK AVENUE
NEW YORK, N.Y. 10017

WALTER E. ANDEROCCI, ESQ.
66 COURT STREET
BROOKLYN, NEW YORK
ATTORNEY FOR RESPONDENT"

Extracts of the Official Record of June 20, 1979, shows:

(p.8)"THE COURT: With counsel's permission, let me inquire so that I can get some of the things that I would be concerned with and certainly both Mr. Meadow and Mr. Anderocci will have an opportunity to examine if you

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feel that you have to clarify anything that I may have asked him.

Mr. Smith, there has been an allegation made in the papers along with supporting facts alleged in the papers, that you are making, at this time, plans to leave the jurisdiction of this Court. What that means in plain language is that you are moving out of the State of New York to move to another state. The papers allege certain thing. First let me ask you is it (p.9) your intention at the present time to remove yourself and your children from the jurisdiction on a permanent basis?

THE WITNESS: No."

(p.22) "THE COURT: Let me ask you this: Mr. Smith, you are now telling me that you will return with the children?

THE WITNESS: Yes.

THE COURT: You do not intend, nor will

APPENDIX N

you remove the children from this jurisdiction other than for a vacation which will not exceed six to eight weeks?

THE WITNESS: Correct.

THE COURT: You realize that you are under oath?

THE WITNESS: Yes.

THE COURT: This is what you are telling me.

THE WITNESS: Yes."

(p.23) "MR. ANDEROCCI: As His Honor indicated to us, (p.24) we are dealing with limited issue whether or not Mr. Smith is going to permanently remove himself from the jurisdiction with his children; that is the only issue that we are dealing with here today as His Honor has said, otherwise I would have conducted myself differently."

APPENDIX N

(p.26) "THE COURT: ...I am, now the question was, and please don't be evasive or super-technical in your response, the question is, when do you intend to leave on vacation?

THE WITNESS: July 7th.

THE COURT: Well, then, why don't you say that (p.27) is the date you intend to leave, July 7th?

THE WITNESS: Your Honor, I have already said that.

THE COURT: No, I don't know when you are leaving. I thought you said in July. Your said the only date I know is June 16th.

THE WITNESS: A weekend.

THE COURT: Yes, a weekend. July 7th is the date that he is planning to leave."

(p.35) "THE COURT: ...I feel frankly, and I will indicate right now, that I am going to permit the children to be taken on vacation not to exceed six weeks and I do

APPENDIX N

that and mention this right in my decision from the (p.36) bench, that I do this relying on the sworn testimony under oath of this witness, Mr. Smith, that he will return to this jurisdiction with the children. Do you understand that, Mr. Smith?

THE WITNESS: Yes, I do. Thank you Your Honor.

THE COURT: After six weeks vacation, when he returns, I am going to indicate and also my direction will be that the children be permitted to spend five days with their grandparents within no later than one week after you return to this jurisdiction. The children will spend five days with the grandparents. Do you understand?

THE WITNESS: Yes."

APPENDIX N

(p.39) "THE COURT: I am not basing it on alleged agreement, because very frankly, the only thing that really this court has to decide is whether or not the children should be taken out of the jurisdiction. I think the situation of extending a vacation from four to six weeks really should not require court action.

There is one thing that I want to be convinced of, at least in my mind, is that the children will be returned and the witness, respondent, has indicated under oath that he has told me personally, and I now accept that, that he will return."

(p.40) "THE COUPT: Counselor, the protection you have is the full face (faith) and credit clause of the United States Constitution and if he was in New Jersey, I am sure that you would know how to proceed to get a New York judgment in force in the State of New Jersey. Quite true, it would

APPENDIX N

pose an additional problem, but it would serve no purpose to this respondent, because I will tell you, and you know it as well as I do, if this respondent takes these children to New Jersey in the face of what he has told this court and there was a judgment brought in this court which would be documented in New Jersey, this respondent will not stand in good staid in this court after what he told this court. So the likelihood of him doing this and moving to New Jersey does not remove your remedy. You still have a legal remedy should he do that. It would be extremely unfortunate and I don't think he would do it because the children would be brought back here."

(p.41) "THE COURT: All other matters having to do with the petition, the writ of habeas corpus, other than that decided by the court

APPENDIX N

will be respectfully referred to Justice Graci.

Should he not return to this jurisdiction as he has indicated, there are legal remedies which can then be brought to bear under the normal legal procedures and at that point, as he knows, and as you know, Counselor, he would not stand in good staid with this court in the likelihood of continued custody."

(p.42) "THE COURT: This hearing will now come to an end. Thank you gentlemen."

APPENDIX O

ORDER EXTENDING TIME FOR HEARING TO DECEMBER 23, 1981

COLORADO COURT OF APPEALS

No. 80CA1216

HARVEY KUDLER and MARCIA KUDLER, Petitioners-Appellants, v. MALLORY IRA SMITH, Respondent-Appellee, and regarding BRIAN ALEXANDER SMITH and VANESSA LAURENT SMITH, Children.	ORDER GRANDING EXTENSION OF TIME TO FILE PETITION FOR REHEARING

The court has considered the motion of petitioners-appellants for an extension of time within which to file their petition for rehearing, and being satisfied that good cause exists and that the delay heretofore is excusable,

IT IS ORDERED that petitioners-appellants have until December 23, 1981, within which to file their petition for rehearing in this case.

BY THE COURT: Kelly, J.
Enoch, C.J.
Van Cise, J.

Dated: November 30, 1981

Copies Mailed To:
Counsel of Record
and Pro Se
On Nov. 30 81
by Mary Blea
Colorado Court of Appeals

APPENDIX P

ARTICLE IV §1 OF THE UNITED STATES CONSTITUTION AND COLORADO UNIFORM CHILD CUSTODY JURISDICTION ACT SECTIONS 14-13-114 114-13-115

"Article.IV. Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

"14-13-114. Recognition of out-of-state custody decrees. The courts of this state shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this article or which was made under factual circumstances meeting the jurisdictional standards of the article, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this article."

APPENDIX P

"14-13-115. Modification of custody decree of another state. (1) If a court of another state has made a custody decree, a court of this state shall not modify that decree unless it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this article or has declined to assume jurisdiction to modify the decree and the court of this state has jurisdiction."

No. 81-2341

Office - Supreme Court, U.S.
FILED
SEP. 8, 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HARVEY KUDLER and MARCIA KUDLER,

Petitioners,

VS.

MALLORY IRA SMITH,

Respondent,

and regarding,

BRIAN ALEXANDER SMITH and
VANESSA LAUREN SMITH,

Children.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This brief is filed on behalf of the Respondent in opposition to the Petition for Certiorari herein.

STATEMENT OF THE CASE

On May 1, 1978, custody of Brian Alexander Smith and Vanessa Lauren Smith was awarded to their natural father, Mallory Ira Smith, who is the respondent herein. The custody order was made by the Supreme Court of the State of New York for Queens County, New York. The New York court also ordered visitation every other Sunday between the children and the maternal grandparents, Harvey Kudler and Marcia Kudler, who are the petitioners herein. At the time the New York order was entered, the father, children and grandchildren all were domiciled in New York. The findings of fact and orders of the New York court are

set forth verbatim at Appendix "D" of the Petition for Certiorari.

Subsequently, the respondent moved to Colorado with the children and established a new domicile in that state. The record does not disclose exactly when the family moved. On December 5, 1979 and March 13, 1980, respectively, the petitioners filed in the District Court for Jefferson County, Colorado a Petition and a Motion for Order in re Visitation and Other Relief by which the petitioners requested the Colorado court to enforce and modify the visitation rights contained in the New York custody order. The Petition and Motion are set out verbatim at Appendices "A" and "B" to this brief, respectively. On May 29, 1980, the petitioners filed a Motion to Amend Petition, which appears at Appendix "H" of the Petition for Certiorari. The

Motion to Amend Petition was granted by the Colorado court, and the petitioners were allowed by the Colorado court to file their Amended Petition, which appears at Appendix "I" of the Petition for Certiorari. By their Amended Petition, the petitioners requested that, in addition to the relief requested in their Petition and Motion in re Visitation and Other Relief, they be granted visitation rights under Section 19-1-116, C.R.S. 1973 (Supp. 1981). Section 19-1-116, which appears at Appendix "M" of the Petition for Certiorari, became effective April 10, 1980. Section 19-1-116(2) empowered Colorado courts to grant visitation rights to certain grandparents when visitation was in the best interests of the grandchildren; the statute also provided for termination of such visitation rights when required by the grand-

children's best interest. 1973 C.R.S. § 19-1-116(4) (Supp. 1981).

On June 13, 1980, the Colorado district court heard the evidence in support of the Amended Petition and the Motion in re Visitation and Other Relief. At the conclusion of the hearing, the court determined that it was in the best interest of the grandchildren that there be no visitation between them and the petitioners, and accordingly ordered that there be no further visitation. The findings and decision of the Colorado district court appear at Appendix "C" of the Petition for Certiorari. On appeal to the Colorado Court of Appeals, the decision of the district court was affirmed. Kudler v. Smith, 643 P.2d 783 (Colo. App. 1981) (The opinion also appears at Appendix "B" of the Petition for Certiorari). Rehearing was denied

on October 29, 1981, and certiorari was denied by the Colorado Supreme Court on April 5, 1982.

SUMMARY OF ARGUMENT

The Colorado court did not, by modifying visitation rights contained in a New York custody decree, deny full faith and credit to the decree when, under the law of New York, the decree was subject to modification. The Colorado court had jurisdiction over the parties and subject matter of this action. It was not obligated to decline to exercise its jurisdiction in deference to the courts of New York when the facts which might have led the Colorado court to decline to act are asserted for the first time in this Court. A custody decree entered on June 13, 1980 is unaffected by 28 U.S.C. §1738A which

was not enacted until December 28, 1980.

ARGUMENT

The Petition for Certiorari asserts that this Court should decide this case because the Colorado courts, by denying the petitioners' asserted right to visitation, failed to give full faith and credit to the judgment of a New York court by which such visitation had been ordered.

I. THE FULL FAITH AND CREDIT CLAUSE DOES NOT PRECLUDE A COLORADO COURT FROM MODIFYING A NEW YORK CUSTODY DECREE WHEN THE DECREE IS SUBJECT TO MODIFICATION UNDER NEW YORK LAW.

The decisions of this Court have established the rule that a child custody order of a state has no constitutional claim to a more conclusive or final effect in the courts of a sister state than would be accorded the same order in the courts of the state in which the order was rendered.

Ford v. Ford, 371 U.S. 187, 192, 194 (1962); Halvey v. Halvey, 330 U.S. 610, 614 (1947). Therefore, a Colorado court was not precluded by the Full Faith and Credit clause from modifying or terminating the petitioners' visitation rights if the petitioners' rights could have been modified or terminated under New York law.

Under New York law, a custody order is modifiable when, after a full hearing, it appears that modification is proper because of changed circumstances or because the best interests of the children will thereby be served. New York Domestic Relations Law § 240 (McKinney, Supp. 1982) (Appendix "C"). A change of residence, such as occurred in this case, is a sufficient change of circumstances so as to require a New York court to modify visitation provisions contained in an earlier

order. Evans v. Evans, 419 N.Y.S.2d 11, 12 (1979); cf. People ex rel. Smith v. Kudler, 418 N.Y.S. 2d 158 (1979)(implicitly recognizing the power of the New York courts, upon proper application and hearing, to modify the very New York custody order at issue in this case); see also Wilder v. Wilder, 402 N.Y.S.2d 559 (1978)(New York courts have inherent power to modify visitation provisions in light of child's best interest).

From the foregoing, it is evident that the Colorado district court was not precluded by the Full Faith and Credit Clause of the United States Constitution from modifying the petitioners' visitation rights.

II. THE COLORADO COURT HAD JURISDICTION OVER THE SUBJECT MATTER AND THE PARTIES.

The Colorado Uniform Child Custody

Jurisdiction Act, §14-13-101 et seq., C.R.S. 1973, defines the circumstances under which Colorado courts may assume jurisdiction to modify a custody determination of another state. Section 14-13-104(1) of the Act provides that:

> A court of this state . . . has jurisdiction to make a child custody determination by initial or modification decree if:
>
> (a) This state is the home state of the child at the time of commencement of the proceeding . . . ; or [emphasis added]
>
> (b) It is in the best interest of the child that a court of this state assume jurisdiction because the child and his parents, or the child and at least one contestant, have a significant connection with this state and there is available in this state substantial evidence concerning the child's present or future care, protection, training and personal relationships . . .

There is no dispute in this case that the Colorado court had jurisdiction over all the parties. From the record,

it is clear that the Colorado courts also had jurisdiction over the subject matter under Section 14-13-104(1)(b). By the time the petitioners filed their Motion in re Visitation and Other Relief on March 13, 1980 and their Amended Petition on May 29, 1980, the alternative jurisdictional requirements of Section 14-13-104(1)(a) were also met as to the relief sought therein. Furthermore, Section 19-1-116(2), C.R.S. 1973 (Supp. 1981), empowers Colorado courts to modify or terminate grandparents' visitation rights "whenever such order would serve the best interest of the child [emphasis added]".

Having invoked the jurisdiction of the Colorado court, the petitioners now argue for the first time in this Court that the Colorado courts lacked jurisdiction to modify petitioners' visitation rights because the children had resided

in Colorado less than six months. In support of their contention, the petitioners have appended to their Petition for Certiorari transcribed excerpts from a hearing in New York in which it is implicit that six months prior to the filing of the Petition in Colorado, the children were still residents of New York. See Appendix "N" of the Petition for Certiorari. The petitioners' argument appears to be that, by virtue of Section 14-13-115, C.R.S. 1973, which appears at Appendix "P" of the Petition for Certiorari, the Colorado courts lacked jurisdiction over the subject matter. Never during the hearing in the trial court nor in their briefs on appeal to the Colorado Court of Appeals did the petitioners argue that the Colorado courts lacked subject matter jurisdiction because of the short duration of the grandchildren's residency in Colorado. Furthermore, the petitioners' attack on

the jurisdiction of the Colorado courts rests on the assumption that the Amended Petition, which was filed May 29, 1980, and the Motion in re Visitation and Other Relief, which was filed on March 13, 1980 and which alleged that the children had resided in Colorado for six months, should, for all other purposes, be deemed retroactive to December 5, 1979 - - the date the Petition was filed. Never until the Petition for Certiorari was filed herein was this issue or the need to resolve it asserted in the Colorado courts.

Moreover, the fact that the children's Colorado residence may have been less than six months does not deprive the Colorado courts of their subject matter jurisdiction. The Colorado Supreme Court has determined that the courts of Colorado always have jurisdiction over matters affecting children in Colorado. See Roberts

v. District Court, 596 P.2d 65, 68 (Colo. 1979). Section 14-13-115, supra, requires only that a Colorado court shall decline the exercise of its jurisdiction under the circumstances stated in the statute. Section 14-13-115(1) provides in pertinent part:

> If a court of another state has made a custody decree, a court of this state shall not modify that decree unless it appears to the court of this state that the court which rendered the decree does not now have jurisdiction . . . and the court of this state has jurisdiction.

From the pleadings and facts presented, especially the petitioners' own allegation in their Motion in re Visitation and Other Relief that the children had resided in Colorado for more than six months, it unquestionably appeared to the Colorado court that it had jurisdiction,

and that New York had lost jurisdiction. The Colorado court was therefore under no statutory obligation to refrain from the exercise of its otherwise lawful jurisdiction.

III. THE PROVISIONS OF 28 U.S.C §1738A DO NOT APPLY TO THIS CASE.

The Colorado courts' authority to modify or terminate the petitioners' visitation rights was unaffected by 28 U.S.C. §1738A, which appears at Appendix "L" of the Petition for Certiorari. That statute was enacted on December 28, 1980, long after this case was decided on June 13, 1980.

CONCLUSION

For the above and foregoing reasons, the respondent requests that the Petition

for Certiorari be denied. Respondent also requests, pursuant to Rule 49.2 of the Supreme Court Rules, that he be awarded damages in the amount of $3,000.00 or such other amount as this Court deems appropriate to defray the respondent's reasonable expenses and fees incurred in connection herewith, on grounds that the Petition for Certiorari is frivolous.

Respectfully Submitted,

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APPENDIX "A"

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No 79DR3109

HARVEY KUDLER and MARCIA KUDLER, Petitioners vs. MALLORY IRA SMITH, Respondent, And Regarding BRIAN ALEXANDER SMITH and VANESSA LAUREN SMITH, Children	PETITION

COMES NOW the above named Petitioners by and through their attorneys of record and SHOW THE COURT as follows:

1. The Petitioners are the maternal grandparents of the children, Brian Alexander Smith and Vanessa Lauren Smith, and as

such have been granted certain vested rights of visitation with the minor children under a valid and existing Order and Judgment of the Supreme Court of the State of New York, County of Queens, entitled People Ex Rel: Mallory Smith, Petitioner, against Harvey Kudler and Marcia Kudler, Respondents, Judgment Index: 7496/77, an exemplified copy of which is on file with this Court and is also attached hereto and made a part hereof as if set forth in full, marked as "Exhibit A".

2. By virtue of the aforesaid Order and Judgement the Petitioners herein are entitled to certain rights of visitation with the minor children as set forth more specifically in that Order.

3. The herein Respondent, Mallory Ira Smith, has deliberately, willfully,

maliciously, and with intent to deprive the Petitioners of those visitation rights has for a period of greater than six months removed the children from the State of New York under the pretext of taking a vacation and failed and refused to return the children to the State of New York as required by the New York Court and has secreted the children from the Petitioners and the New York Court.

4. The Respondent is a man with past history of violence and the Petitioners fear that unless Relief be granted as prayed for hereinafter in the form of a Writ of Habeus Corpus and Writ of Ne Exeat the Respondent will immediately upon acquiring knowledge of the pendency of this action flee the jurisdiction of the Courts of the State of Colorado and take the children with him in an effort to further obstruct justice.

5. The Respondent is presently residing in a trailer court in the vicinity of 52nd and Saulsbury in Arvada, Colorado, a location within the County of Jefferson and State of Colorado.

6. The Petitioners further inform this Honorable Court that an arrest warrant for the Respondent is presently outstanding in the State of New York by virtue of a "Warrant of Attachment", a copy of which is attached hereto and made a part hereof as is set forth in full, wherein the arrest of the herein Respondent is Ordered by Virtue of Respondent's disobedience of the Judgement and Orders of the New York Court involving visitation.

7. The Petitioners further allege that the Respondent stands in defiance of the Court Order and Judgement regarding

visitation and, unless appropriate relief is granted by the present Court, will defy this Honorable Court in its efforts to enforce the Orders and Judgements of a sister State.

WHEREFORE, Petitioners pray that this Honorable Court make such Orders that are necessary to enforce the provisions of the Judgement and Order rendered by the Supreme Court of the State of New York in the actions as set forth herein and above to provide for visitation on the part of the Petitioners with the minor children. Further, that this Court make inquiry into the matters set forth herein and above and render such Judgement and Orders as are necessary to prevent the Respondent from removing the children from the State of Colorado and to compel the Respondent to allow the Petitioners herein to obtain such visitation under the terms and conditions as may be

decreed just in the premises.

Petitioners further pray that a monetary judgement enter against the Respondent for attorneys' fees and costs as may seem just in the premises.

Respectfully submitted,

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APPENDIX "B"

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No. 79DR3109, Div. 7

HARVEY KUDLER and MARCIA KUDLER, Petitioners	)	
vs.	)	
MALLORY IRA SMITH, Respondent	)	MOTION FOR ORDER IN RE VISITATION AND OTHER RELIEF
And Regarding	)	
BRIAN ALEXANDER SMITH and VANESSA LAUREN SMITH, Children.	)	

COMES NOW the above named Petitioners, by and through their attorneys of record, Bohm, Connell and McLellan, and SHOW THE COURT as follows:

1. The Petitioners are the maternal grandparents of the children, Brian Alexan-

der Smith and Vanessa Lauren Smith, and as such have been granted certain rights of visitation with the minor children under a valid and existing Order and Judgment of the Supreme Court of New York, County of Queens, entitled People Ex Rel: Mallory Smith, Petitioner, against Harvey Kudler and Marcia Kudler, Respondents, Judgment Index: 7496/77, an exemplified copy of which is on file with this Court and is made a part hereof as if set forth in full.

2. By virtue of the aforesaid Order and Judgment the Petitioners herein were and are entitled to visitation with the minor children as set forth specifically in the aforesaid Order.

3. The children are and have been for a period greater than six months residents of the State of Colorado residing with their father, the Respondent herein.

4. The Respondent and the children reside at 5837 Pierce Street, Arvada, Colorado, Apt. #101. The Petitioners reside at 178-06 69th Avenue, Flushing, New York, 11365.

5. Due to the lack of proximity between the Petitioners and the residence of the children the Order of the Court of New York setting forth terms and conditions of visitation cannot be reasonably exercised by the Petitioners.

6. That despite intensive negotiations between the Petitioners and the Respondent concerning the same no agreement has been arrived at between the Petitioners and the Respondent as to the terms and conditions governing any visitation or communication between the Petitioners and the children.

7. The Respondent has failed and refused to allow visitation or communication between the Petitioners and the children and such refusal is contrary to the intent of the Order of the Supreme Court of the State of New York.

8. The Order of the Supreme Court of the State of New York as set forth hereinabove is entitled to full faith and credit by the courts of Colorado.

9. It is in the best interest of the children that such visitation both within the State of Colorado and with the Petitioners in the State of New York together with periodic communication both by telephone and by letters be allowed.

WHEREFORE, Petitioners pray that a hearing as to the matters complained of

herein be had and that an Order enter allowing the Petitioners visitation under reasonable times, terms and conditions be had with the children both in the State of Colorado and in the State of New York; that the Petitioners be allowed access to the children both by telephone and by mail under reasonable terms, times and intervals; and for such other and further relief as the Court may deem just in the premises.

Respectfully submitted,

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APPENDIX "C"

N.Y. DOMESTIC RELATIONS LAW
(McKinney, Supp. 1982)

§240. Custody and maintenance of children
1. In any action or proceeding brought . . . to obtain, by a writ of habeas corpus or by petition and order to show cause, the custody of or right to visitation with any child of a marriage, the court must give such direction, between the parties, for the custody, care, education and maintenance of any child of the parties, as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child . . . . Such direction may provide for reasonable visitation rights to the maternal and/or paternal grandparents of any child of the parties . . . . Upon the application of either parent, or of any other person or party having the care, custody and control of such child pursuant to such judgment or order, after such notice to the other party or parties or persons having such care, custody and control and given in such manner as the court shall direct, the court may annul or modify any such direction, whether made by order or final judgment . . . .

Office - Supreme Court, U.S.
FILED
SEP 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2341

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HARVEY KUDLER and MARCIA KUDLER,

Petitioners,

vs.

MALLORY IRA SMITH,

Respondent,

and regarding,

BRIAN ALEXANDER SMITH and
VANESSA LAUREN SMITH,

Children.

PETITIONERS' REPLY MEMORANDUM ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF COLORADO

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NO. 81-2341

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

HARVEY KUDLER and MARCIA KUDLER,

Petitioners,

vs.

MALLORY IRA SMITH,

Respondent,

and regarding,

BRIAN ALEXANDER SMITH and
VANESSA LAUREN SMITH,

Children.

PETITIONERS' REPLY MEMORANDUM ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEARLS FOR THE STATE OF COLORADO

Petitioners Harvey Kudler and Marcia Kudler submit this brief in reply to the brief of respondent in opposition to their petition for a Writ of Certiorari.

(a)

At no point in respondent's brief does respondent dispute the "Order" of Hon. Joseph P. Lewis, on December 5, 1979, cited in petitioners' brief with respect to how the Federal question was raised in the State of Colorado (Pet. Br., pp 6, 10).

Said "Order" is reproduced in full, as Petitioners' Appendix Q, infra pp 87a-102a. The "Order" appears at pp 98a-102a, supra.

(b)

The language at page 100a is direct, clear, definitive and, on its face shows that it rests on the full faith and credit clause of Article IV §1 of the Federal Constitution.

From any aspect said "Order" of December 5, 1979, was binding on both petitioner and respondent. It was not subject to approval by any party before the Court.

Patently, it directs compliance with the Judgment of the Supreme Court of the State of New York, dated May 1, 1978, in accordance with the provisions therein stated at the foot of the New York Decree, (Appendix D, page 35a), in petitioners' brief.

(c)

"People ex rel. Smith v. Kudler, dated July 9, 1979, cited in Respondent's brief (p. 9), is officially reported in 71 AD 2d 634. It is set forth herein as petitioners' Appendix "R", infra, p. 103a.

There is a twofold significance in the opinion dated July 9, 1979:

1. On its face it shows that the State of

New York exercises its jurisdiction over the subject matter at bar. Also, the Judgment of May 1, 1978, was affirmed twice by the Appellate Court, demonstrating the continuous jurisdiction relating to the Judgment dated May 1, 1978 (petitioners' brief, pp 19-20, 23-26, 75a-82a).

2. It effectively disposes of respondent's argument appearing at page 15, respondent's brief in opposition:

"...that New York had lost jurisdiction."

(d)

It cannot be gainsaid that Halvey v. Halvey, 330 U.S. 610, 614 (1974) cited at p. 8 in respondent's brief, is neither applicable nor controlling in the case at bar, viewed in the background facts set forth in People ex rel Smith, 71 AD 2d, 634, supra.

"Whether the principle of that case is applicable to this depends upon this consideration, whether the facts of that case are the same or of the same essential nature as the facts of this case. Legal principles spring from the essential facts of a case and it is not safe to apply the principle which controls the decision of one case to the decision of another case until the facts of the two cases have been closely compared and found to be essentially the same."
(Lorillard v. Clyde et al, 122 N.Y. 498, 502 (1890).)

(e)

On the other hand, the petitioners cited in its brief, (pp 57a-60a), the principle of law enunciated in Halvey v. Halvey, 330 U.S. 610, 614, which is operative and pertinent to the enforcement of the Judgment, dated May 1, 1978, supra. (Petitioners' Brief, pp 62a-63a).

(f)

Viewed in the background of the Hearing held on June 20, 1979, and considering the solemn oath made by respondent in answer to the

vital questions presented by Judge Kunzman (pages 23-25, petitioners' brief), it is arrant nonsense for the respondent to assert at page 8 in its brief in opposition to the petition for certiorari:

> "A change of residence, such as occurred in this case is a sufficient change of circumstances so as to require a New York Court to modify visitation provisions contained in an earlier order." (Emphasis supplied)

(g)

It is erroneous for respondent at page 15 of its brief to assert that 28 U.S.C. §1738A (Appendix "L", Petitioners' Brief) is inapplicable to the case at bar on the ground:

> "That statute was enated on December 28, 1980, long after this case was decided on June 13, 1980."

Patently, the judgment of the District Court is not a final judgment for purpose of applicability to 28 U.S.C. 1738A.

In view of the importance of 28 U.S.C. 1738A, to the cases as Halvey v. Halvey, cited by petitioners in its brief (pp 27-29), this Court may exercise its discretion and consider the applicability of the foregoing new federal statute as a substantial federal question affecting the judiciary in the 50 states. Cf.: Bradley v. Richmond School Board, 416 U.S. 696, 711; Halvey v. Halvey, 330 U.S. 610, 614, 619, 620; United States v. Alabama, 362 U.S. 602, 604; Zifferin, Inc. v. United States, 318 U.S. 73, 78; V.5B, C.J.S. Appeal and Error §1841, pp 244-245.

CONCLUSION

For the reasons stated hereinabove and in the petition, petitioners pray that the Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX Q

TRANSCRIPT OF DECEMBER 5, 1979 HEARING

IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No. 79DR3109, Div. 7

HARVEY KUDLER and MARCIA KUDLER, Petitioners, vs. MALLORY IRA SMITH, Respondent, And Regarding, BRIAN ALEXANDER SMITH and VANESSA LAUREN SMITH, Children.	REPORTER'S TRANSCRIPT Volume I

Cause comes on for hearing before the Court on Wednesday, the 5th of December, 1979, at the hour of 4:00 p.m., before Honorable Joseph P. Lewis, District Court Judge of Division 7, in and for the First Judicial

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District, County of Jefferson, State of Colorado.

A P P E A R A N C E S

MR. JERRY C. CONNELL and MR. SEYMOUR FRIEDMAN, Attorneys at Law, appeared on behalf of the Petitioners.

WHEREUPON, the following proceedings were had, to wit:

I N D E X

Stipulation re: Visitation

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THE COURT: 79DR3109, Harvey and Marcia Kudler, Petitioners, versus Mallory Ira Smith, Respondent and regarding Brian Alexander and Vanessa Lauren Smith, children.

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MR. CONNELL: If the Court please, my name is Jerry Connell of the firm of Bohm, Connell & McLellan, registration number 2712, with Seymour Friedman, attorney, the State of Colorado, has been admitted for the practice of this case as co-counsel.

This matter comes on before the Court upon a return of two writs, one a writ of ne exeat and a writ of habeas corpus. I wish to thank the Court for the opportunity and graciousness that you have biven us in order to use this courtroom and this Court's facilities in arriving at an agreement which we hope may settle or begin settling the differences between these parties.

As explained to the Court earlier, this is a matter concerning the visitation of the grandparents of the Petitioners herein, which were vested in them by an order of the

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Supreme Court of the State of New York. The father, the Respondent, who is present here, has custody of the children, subject to that visitation.

We have discussed this matter outside the presence of the Court. I would like to offer to the Court, a stipulation which, for the Court's approval, and I would like to read it into the record and have the Court ask these parties if that is what they agree with the following provisions:

That Mr. Smith is not, does not have an attorney present with him, and that the matter b continued for a short period of time, several days, for him to consult with an attorney and to he can always ask the Court to reconsider this for certain reasons.

First, the parties offer this, number one that the children, the two minor children which are named in the petition, shall be returned to

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the State of New York for a period of thirty days during the summer, each summer period beginning in the summer of 1980. During that time the children shall spend fifteen days with the Petitioners and fifteen days with the paternal grandparents. The cost of such transportation shall be split fifty-fifty.

The second item will be that during -- the maternal grandparents, the Petitioners herein shall be entitled to visitation with the children in New York on alternate winter and spring school vacation breaks.

Now, if I may be a little bit more specific and define the winter break, would be that time when school is out for what is commonly known as the Christmas holidays, but the children would be sent to New York on the following Christmas and would be returned to Colorado on at least twenty-four hours before the school takes up in the following first week in January. It would

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be the duty of Mr. Smith to notify the grandparents of these dates. The Petitioners would cover the cost of that transportation. The spring break is the one that usually takes place in the vicinity of what's known as the Easter holidays. The children would be sent to New York within twenty-four hours of their getting out of school and would be returned at least twenty-four hours before school takes up during that break.

The reason we're not pinning that down is because these holidays sometimes drift back and forth and there's sometimes they have ten days, sometimes they have eight, sometimes they have more, we don't know, but the parties understand that we're talking about and should govern themselves accordingly.

Now, the grandparents should be allowed to write the children as often as they wish. Mr.

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Smith will keep the grandparents informed either directly or through me of their address, their whereabouts. The Petitioners shall be allowed to telephone, allowed reasonable rights of communicating with the children by telephone, and these rights shall not be abused. Reasonable can be determined as to what the circumstances are at the time, but in normal, ordinary course could be considered no more than once a week.

During that summer vacation, as we said before, Mr. Smith will notify the grandparents ninety days prior to the children arriving in New York, at least ninety days so they can make adequate plans and he can also coordinate with his summer vacation.

Furthermore, upon them coming to New York, Mr. Smith will provide the children and make sure that they take along sufficient clothing, toys, books, their possessions. These will be

returned with the children when they're returned. The Petitioners shall notify Mr. Smith in writing, also within that, within that ninety day period of activities that they intend to have the children do so. Mr. Smith can make provisions as far as clothing and other items.

As to the children, guaranteeing the children's return to Colorado, the Petitioners are willing to enter into a reasonable, and we ask the Court to be a minimal bond, because of their good faith in coming before this Court, which they would post with the Court prior to the visitation, to guarantee that the children will be returned to Colorado. We've discussed the matter with Mr. Smith, and we are aware of his financial means. He's informed us, and we believe he's telling us the truth that he does not have the wherewithal to post bond to guarantee the delivery of the children, so we

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would ask the Court to adopt what might possibly be an unusual approach. We ask the Court to continue this habeas corpus hearing from time to time, for an extensive period of time until we see how this works out to guarantee that the children would be available before this Court in the event that Mr. Smith were to disobey the orders of this Court. We also request that the writ of ne exeat be quashed.

When the children are with the Petitioners in New York, they are free to call the paternal grandparents, just as the children, when they're in New York with the paternal grandparents, are free to call the Petitioners, and during the Easter or winter or Christmas vacations, as the case may be.

THE COURT: And to visit with the maternal grandparents?

MR. CONNELL: Yes, Your Honor.

Nothing that we have read into the record

here shall prevent these parties from making, entering into any other agreement as may be agreed upon between the parties from time to time, but in the event that a dispute arises over its terms and condition, then what we have read into the record shall pertain to both of them and so long as whatever provisions are made are in the best interests of the children, so long as whatever changes are made are within the best interests of the children.

Does the Court have any questions?

MR. SMITH: I want something said, that as far as my employment is concerned, that the Kudlers should interfere in no way with my employment. That has to be in there.

MR. CONNELL: We will inform our clients of what their duties and what they are, and I will tell them what the laws of Colorado are, and should anything come about that causes you

problems in any way, you contact me first and I'll try my best to get it straightened out. That much I can do, I promise you. I don't think it has a place.

MR. FRIEDMAN: Let me just say this to the Court: I want to thank the Court, especially on the record. This has been a very long and arduous litigation, a litigation which has, unfortunately, it's nothing to brag about, but it has national notoriety. And I know the Court feels like I do, that the most important thing is the interests, are the interests of these children. This Court, by allowing the very lengthy consultation of many hours between the parties, the attorneys, allowing the children to partake in some of the parts of the conferences, and also by issuing a perfectly legal, but unusual and tedious remedy, has shown great concern for the interests of these children. And I think

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that the record should be clear that this Court -- well, I can't say we went beyond the call of duty, because that is the duty of the Court, but this Court exemplified my opinion of the highest and noblest traditions that is incumbent upon our courts to exhibit.

I also think that the Kudlers, who have traveled the breadth of this nation, physically, as well as telephonically in search of these beloved grandchildren, wish to thank the Court. And I also say that I thank the father of these children, who I am sure has undergone tremendous psychological and emotional pressure, and I think that the getting together of these people in this courtroom is not only a monumental accomplishment, but one which I hope will bring these children, above all, content-ment, peace and a little security forevermore. And I thank the Court, especially, as I do, so

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want to pay my especial thanks to one of the city's very fine attorneys that went way beyond the call of duty, and that's Mr. Connell. Thank you.

THE COURT: Mr. Smith, you've heard the stipulation and you agree to it?

MR. SMITH: Well, I would still have to speak to my attorney.

THE COURT: I understand that.

MR. SMITH: I agree to it.

THE COURT: As the provisions are made in the agreement, that you do have an opportunity, of course, to consult with counsel.

MR. SMITH: Uh-huh.

THE COURT: In this matter.

But other than that, the other terms you are in agreement with?

MR. SMITH: Right.

THE COURT: Is that correct?

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Now, I am going to say to both parties, in the interests of the children, the best interests of the children, that this Court is interested in, and neither of the parties, the Petitioner, Respondent in this case, will do anything to cause any difficulties with the children and not to make any remarks on anything to the children as against one of the other parties. That's not proper, and you'll alienate the children if you do so.

Furthermore, when the children are supposed to be returned from New York, they will be at that time. You are under order of this Court, and you will have to comply with the order. You are under orders from the Court in New York and they also will have jurisdiction so that you can not in any way violate the terms and conditions of the visitation, not in any manner. Mr. Smith's willing to comply, but

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when he sends the children back there, he has a right to expect them back at the time designated and not any later. The children have to get back to school, and it's important that they back in time, and so long as they're in New York and both grandparetns are there, that they have an opportunity to visit and call the maternal grandparents as well as the paternal grandparents, so if you comply with all of that, there shouldn't be any problems among you in the future. If you have any disagreements, bring it to me if you can't agree among yourselves.

Do you think you can live with that?

MR. SMITH: Thank you.

THE COURT: I think you all can. All right. Will you reduce that to writing?

MR. CONNELL: Yes, your Honor. And I believe I better have a transcript.

THE COURT: All right. And be sure

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Mr. Smith reads it and has an opportunity to approve it.

MR. CONNELL: I think I have got sufficient intention to get the guts of it. Some of the details, I didn't get, so I would like a transcript, if I may. On the other hand, I will reduce it, a tentative stipulation, provide it to Mr. Smith for him to consult with his attorney, and then he will, his attorney will get back to me with his response.

THE COURT: Very well. That order will provide the writ of ne exeat is dismissed and the habeas corpus will be continued from time to time until dismissed by the Court.

MR. CONNELL: Thank you, Your Honor.

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71 AD 2d 634
July 9, 1979 - Second Dept.

25 THE PEOPLE OF THE STATE OF NEW YORK ex rel. MALLORY SMITH, Appellant, v HARVEY KUDLER et al., Respondents.—In a habeas corpus proceeding involving the custody of two children, the petitioner father appeals from a judgment of the Supreme Court, Queens County, entered February 15, 1979, which modified and increased the visitation granted to the respondents, grandparents of the children in question, in a prior judgment dated May 1, 1978. Judgment reversed, on the law, with $50 costs and disbursements, and the original visitation provisions are reinstated. In this custody proceeding between the petitioner, father of the two children involved, and the respondents, the parents of the mother, who is now dead, Special Term had previously awarded custody to the father but permitted visitation by the grandparents every other Sunday. That judgment was appealed from by the grandparents and affirmed by this court (*People ex rel. Smith v Kudler*, 66 AD2d 1035, mot for lv to app den 46 NY2d 709). The modification herein was made without a formal hearing. No sworn testimony was taken and no new findings of fact or conclusions of law were made. The parties were before the court on an application to punish the grandparents for contempt. There was no petition for modification of the visitation provisions of the judgment properly before the court at the time and no emergency requiring immediate removal of the children from the petitioner's home was shown. It is elementary that a judgment directing custody and visitation, recently entered by one Judge, should not be disturbed by another Judge of co-ordinate jurisdiction in the absence of a change in circumstances (*Powers v Powers*, 119 App Div 436; *Gould v Gould*, 261 App Div 904). The transcript of the proceedings shows that the court was aware of that rule when it modified the prior judgment but chose to proceed anyway. We hold this to be an improvident exercise of discretion. Even if a petition for modification had been before the court, it would have been error to modify the original visitation provisions without a hearing (cf. *Kresnicka v Kresnicka*, 48 AD2d 929). Suozzi, J. P., Cohalan, Margett and Martuscello, JJ., concur.